(12)

No. 84-310-CFX
Status: GRANTED

Title: In Re Robert J. Snyder, Petitioner

Court: United States Court of Appeals for the Eighth Circuit

Docketed:
August 20, 1984

Counsel for petitioner: Peterson, David L.

Counsel for respondent: Sidney, Ross H., Greer, John J.

Entry	Date	Note	Proceedings and Orders
1	Aug 20 1984	G	Petition for writ of certiorari filed.
2	Jul 12 1984		Application for stay filed.
3	Jul 16 1984		Response requested - Due 7/30/84 by Blackmun, J.
4	Jul 31 1984		Response thereto filed.
5	Aug 6 1984		Application for stay granted by Blackmun, J.
6	Aug 29 1984	G	Motion of Ohio State Bar Association for leave to file a brief as amicus curiae filed.
7	Oct 3 1984		DISTRIBUTED. October 26, 1984
8	Oct 19 1984	P	Response requested. (Due November 19, 1984 - NONE RECEIVED)
10	Nov 10 1984		Order extending time to file response to petition until December 19, 1984.
11	Dec 18 1984		Brief of respondent in opposition filed.
12	Dec 18 1984		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers, Inc. filed.
13	Dec 19 1984		REDISTRIBUTED. January 11, 1985
14	Jan 14 1985		Motion of Ohio State Bar Association for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
15	Jan 14 1985		Petition GRANTED. Justice Powell OUT.
			**********
16	Feb 14 1985		Record filed.
17	Feb 14 1985		Certified copy of C.A. proceedings received. (1 volume).
18	Feb 28 1985		Brief amicus curiae of OH State Bar Assn. filed.
19	Mar 2 1985		Brief amicus curiae of American Civil Liberties Union filed.
20	Mar 2 1985		Brief of petitioner Robert J. Snyder filed.
21	Mar 2 1985		Joint appendix filed.
22	Mar 15 1985		SET FOR ARGUMENT. Tuesday, April 16, 1985. (2nd case).
23	Mar 22 1985		CIRCULATED.
24	Apr 1 1985	X	Brief of respondent U.S.C.A. - 8th Circuit filed.
25	Apr 2 1985	G	Motion of United States Court of Appeals for the Eighth Circuit to supplement the Joint Appendix filed.
26	Apr 15 1985		Motion of United States Court of Appeals for the Eighth Circuit to supplement the Joint Appendix GRANTED.
27	Apr 16 1985		ARGUED.
28	Apr 10 1985	G	Motion of petitioner for leave to file reply brief, out-of-time, filed.
29	Apr 22 1985		Motion of petitioner for leave to file reply brief, out-of-time, GRANTED.
30	Apr 22 1985		Reply brief of petitioner Robert J. Snyder filed.

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84-310

No.

In the Supreme Court of the United States

October Term, 1984

In the Matter of:

Attorney Robert J. Snyder.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

1. Whether the disciplinary procedures of the Court of Appeals afford an attorney due process of law as envisioned by the Constitution of the United States.

2. Whether the disciplinary procedures of the Court of Appeals can constitutionally abrogate the First Amendment rights of Attorney Robert J. Snyder.

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No.

In the Supreme Court of the United States

October Term, 1984

In the Matter of:

Attorney Robert J. Snyder.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The undersigned attorneys, on behalf of Petitioner Robert J. Snyder, petition for Writ of Certiorari for review of the judgments of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. A1-A14) is reported at 734 F.2d 334 (8th Cir. 1984). This initial decision was a response to the court's own order to show cause why Attorney Robert J. Snyder should not be suspended from practice in the Federal Courts.

The second opinion of the Court of Appeals (App. B, *infra*, pp. A15-A22) is not yet reported. The second decision was a response to a petition for rehearing of the original order. A review is being sought with respect to both decisions.

JURISDICTION

The decisions of the Court of Appeals (App. A and B, *infra*, pp. A1-A22) were filed April 13, 1984, and May 31, 1984. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULE INVOLVED

1. U.S. Constitution, Amendment I provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the government for redress of grievances."

2. U.S. Constitution, Amendment V provides in pertinent part:

"No person shall . . . be deprived of life, liberty and property without due process of law. . . ."

STATEMENT

In March of 1983, Attorney Robert J. Snyder was appointed to represent a defendant under the Criminal Justice Act by the District Court, District of North Dakota. After the criminal proceedings were completed, Attorney Snyder, pursuant to §3006A(d)(4) of the Criminal Justice Act, submitted to the District Court a claim for services and expenses. The claim was reduced by the District Court and the modified request was then approved and sent to the Circuit Court.

Under the Criminal Justice Act, the Chief Judge of the Circuit Court must review and approve any expenditures for compensation in excess of the $1,000.00 limit. 18 U.S.C. §3006A(d)(3). Attorney Snyder's application was deemed to be deficient by the Chief Judge of the Circuit Court, and the claim was returned to the District Court with requests that additional information be provided. The claim application was supplemented by Attorney Snyder and returned to both the District Court and ultimately the Court of Appeals. Once again, the application was returned by the Chief Judge of the Circuit Court, indicating that the claim still did not comply with the Criminal Justice Act guidelines, and requested further documentation.

After discussing the matter with the secretary of the District Court, and at her suggestion, Attorney Snyder sent to the secretary of the District Court a letter dated October 6, 1983, which letter later became the basis for suspension. In that letter, Attorney Snyder indicated that he was responding to the request of the administrative personnel of the Eighth Circuit Court (App. C, *infra*, pp. A25-A26).

In the letter to the secretary of the District Court, Attorney Snyder indicated among other things that he was "appalled" at the small amounts paid to attorneys for indigent criminal defense work. He indicated his displeasure at the "extreme gymnastics" required to receive "puny amounts", and declared:

"We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it".

The letter was concluded by Attorney Snyder stating that he was "extremely disgusted" by the treatment of

him by the Court of Appeals, and that he wished to be taken off the list of attorneys willing to accept appointment in such cases, and stated further that he had "simply had it" (App. C, *infra*, p. A26).

The letter of Attorney Snyder addressed to the Secretary of the District Court was ultimately sent to the Court of Appeals. Upon receipt of this information, the Chief Judge of the Circuit Court requested that the District Court confer with Attorney Snyder to determine if Snyder would retract what it perceived to be "disrespectful remarks to the Court". In a letter dated November 3, 1983, the Chief Judge of the Circuit Court observed that:

> ". . . in view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the Federal Court on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one year." (App. D, *infra*, p. A29).

On December 22, 1983, the Circuit Court issued an order to show cause why Attorney Snyder should not be suspended from the practice of law in the federal courts for his refusal to offer services under the Criminal Justice Act and to comply with "relevant guidelines". There was a request by Attorney Snyder for a hearing before the full court, *See* Fed.R.App.P. 46(c). However, the matter was referred to a panel which was headed by the Chief Judge of the Circuit Court, who was the same individual who directed that an order to show cause be issued in the first place (App. E, *infra*, pp. A30-A31).

The order to show cause was directed at the perceived refusal by Attorney Snyder to represent indigent criminal

defendants under the Criminal Justice Act, 18 U.S.C. §3006A. The order to show cause which was signed by the Chief Judge of the Circuit Court directed that Attorney Snyder show cause why he should not be suspended from practice for his refusal to participate under the Criminal Justice Act (App. E, *infra*, pp. A30-A31).

As a result of that specific directive, Attorney Snyder prepared a lengthy response which included copies of the Criminal Justice Act for the District of North Dakota, which had previously been approved by the Eighth Circuit Court of Appeals, showing that under the provisions of the plan and its implementations, his stated refusal to serve as counsel for indigents was allowed from the time the Act was implemented to date. In fact, the statistics of the district indicated that approximately 200 of some 275 lawyers in the southwestern division of the District of North Dakota had also, for various reasons, chosen not to serve on the panel.

The hearing was scheduled before a three judge panel, which included the Chief Judge of the Circuit Court. Attorney Snyder, upon being advised that the panel included the Chief Judge of the Circuit Court, did enter a written demand that the Chief Judge remove himself because of his involvement in the matter through letters to the federal judges in the District of North Dakota and specifically the letter of November 3, 1983, to the District Court. This demand was refused, and Chief Judge Lay served on the panel.

The hearing upon the order to show cause was held before a three judge panel on February 16, 1984, at which time Attorney Snyder appeared pro se. The original return which was filed by Attorney Snyder was in direct response to the order to show cause, and explained the basis and reason that Attorney Snyder could not be sus-

pended for having determined that he would not serve on the panel for indigent defendants. Nothing was included in the return regarding Mr. Snyder's guaranteed First Amendment rights of free speech because the order to show cause did not mention or direct that he show cause why he should not be suspended because of the content of his letter directed to the Secretary of the District Court.

At the hearing on February 16, 1984, the discussion centered upon the content of the letter rather than upon the refusal by Attorney Snyder to continue serving on the Criminal Justice Act panel.

At the conclusion of the hearing, the panel advised Attorney Snyder that he would be suspended from practice in the federal courts unless, within ten days, he submitted a letter to the Court indicating that (1) he would agree to serve on the panel on a newly revised plan; and (2) that when so serving he would comply with the guidelines in effect for the submission of billings for his services; and (3) that he would retract or apologize for the language contained in the October 6, 1983, letter directed to the Secretary of the District Court.

Attorney Snyder agreed to items 1 and 2, and sent such a letter to the Chief Judge of the Circuit Court. However, he refused to either retract or apologize for the remarks in his October 6, 1983, letter. Accordingly, on April 13, 1984, Chief Judge Lay authored an opinion for the panel which stated:

> "We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the eighth circuit for a period of six months; thereafter, Snyder should make application to both this court and the federal district court of North Dakota to be readmitted."

A petition for rehearing was filed on behalf of Attorney Robert J. Snyder, which produced a second opinion by the Court of Appeals (App. F, *infra*, pp. A32-A42). Within the order denying the petition for rehearing en banc, the Court of Appeals addressed several issues which had not been addressed in the April 13, 1984, opinion. Specifically, with respect to the argument of the failure to afford due process of law, the Court of Appeals stated:

> "Second, it is abundantly clear from the record that Snyder had notice that his disrespectful letter could be a basis for discipline. Snyder was given at least three opportunities to apologize for the letter, and declined to do so."

The Court of Appeals also addressed the issue of free speech. In that regard, the Court of Appeals declared:

> "Snyder urges that he should not be disciplined for exercising his First Amendment rights to criticize, and express frustration, toward the Court. The gravamen of the situation is that Snyder in his letter became harsh and disrespectful to the court. It is one thing for a lawyer to complain factually to the court; it is another for counsel to be disrespectful in doing so."

The rehearing en banc was denied, with two of the judges of the Eighth Circuit voting to grant the petition. The Court of Appeals conditionally vacated the order of suspension and provided an additional ten days from the date of the order denying rehearing en banc to allow Attorney Snyder to provide

> "a sincere letter of apology to this court for disrespectful comments directed to the court in his letter of October 6, 1983, . . ."

The clerk was directed that if there was a failure to comply with that request, that the original order of suspension would be reinstated with the six month suspension to run from the date of the original order.

REASONS FOR GRANTING THE PETITION

The order to show cause which was issued in December of 1983 specifically stated that Attorney Snyder was to show cause why he should not be suspended from the practice,

> "for such a period of time as his refusal to serve continues. . . ." (App. E, *infra*, p. A31).

In the opinion issued by the Court of Appeals on April 13, 1984, the panel of the Court of Appeals, in discussing why Attorney Snyder was ordered to show cause why he should not be suspended from practice in the Federal Courts, declared:

> "Attorney Snyder has been cited: (1) for his refusal to continue to perform services in indigent cases under the Criminal Justice Act (CJA), 18 U.S.C. §3006A (1982); and (2) for his disrespectful refusal to comply with the guidelines under the CJA relating to the submission of expenses and attorney fees."

That was not, however, the language contained in the show cause order.

It also became obvious at the time of the show cause hearing on February 16, 1984, that the matters discussed by the panel of the Court of Appeals were vastly different than the matters contained in the specific language that was in the show cause order which had been sent to Attorney Snyder. The language of the order to show

cause made absolutely no mention of any "disrespectful refusal to comply" with the guidelines of the Criminal Justice Act. Additionally, it is clear from the language of the opinion of the Court of Appeals that the basis for the court's ordering the suspension of Attorney Snyder was for his refusal to "offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October 6." (App. A, *infra*, pp. A3-A4).

The initial opinion of the Court of Appeals on the order to show cause authored by Chief Judge Lay includes the statement:

> ". . . without hesitation, we find Snyder's disrespectful statements as to this court's administration of CJA *contumacious* conduct."

It then follows in the next paragraph that he is ordered suspended by the Court of Appeals.

Attorney Snyder has been denied his First Amendment rights and due process of law in that the order to show cause was not directed to the language contained in the letter of October 6, 1983, and therefore in his return to the order to show cause, he made no reference to the letter, nor made any argument with respect to it. It is submitted that if the original order to show cause had stated that Attorney Snyder was to show cause why he should not be suspended from practice because of statements contained in the October 6, 1983, letter, the return to the order to show cause filed by Attorney Snyder would have made reference to the First Amendment to the United States Constitution and other decisions regarding freedom of speech.

It is further submitted that Attorney Snyder has been suspended because of the content of the October 6, 1983, letter, without having had the due process of law

afforded to him by the United States Constitution. He has not been afforded (1) proper notice of the reasons for the proposed suspension from practice; (2) an opportunity to be heard on the specific charge that his letter was disrespectful, and that its contents would justify suspension of his privileges to practice; and (3) there was no hearing provided with respect to the assertion that the October 6, 1983, letter was a basis for suspension of his privileges to practice before the Court of Appeals and the Federal Courts. Attorney Snyder was not advised in the order to show cause that the matters contained in the October 6, 1983, letter were to serve as the basis for a possible suspension and, therefore, he did not have an opportunity to appropriately respond to those allegations.

Additionally, it is submitted that the Chief Judge of the Court of Appeals should have excused himself in consideration of this matter because of the provisions of 28 U.S.C. §455, which states in pertinent part as follows:

"*Disqualification of justice, judge, or magistrate*:

(A) Any justice, judge, . . . of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned.

(B) He shall also disqualify himself in the following circumstances:

a. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ."

The language of the statute was also a part of Canon 3C of the *Model Rules of Professional Conduct* and *Code of Judicial Conduct*, which states in pertinent part as follows:

"(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, included but not limited to instances where:

a. He has a personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding; . . ."

It is submitted that the Chief Judge's initial involvement in the matter before the issuance of the order to show cause falls within the provisions of 28 U.S.C. §455, in that he did have personal knowledge of the facts concerning the proceedings. By sitting on the panel after he initially indicated in his letter that he questioned whether Mr. Snyder was "worthy of practicing law in the federal courts on any matter", the Court again deprived Attorney Snyder of due process of law as guaranteed by the United States Constitution. Attorney Snyder did request that the Chief Judge excuse himself; however, the Chief Judge did not excuse himself, and in fact sat as the Chief Judge of the panel in February, 1983, and subsequently wrote the opinion which suspended Attorney Snyder for a period of six months.

The order of suspension should also be set aside because to order the suspension of Attorney Snyder because of his comments in the October 6, 1983 letter, would and does violate his First Amendment rights.

It is apparent from the original decision of the Court of Appeals that the suspension of Attorney Snyder is entered, not on the grounds set forth in the order to show cause, but because of the language contained in the October 6, 1983 letter, which was solicited by the Secretary of the District Court and sent to her. If that is to be the basis of the disbarment, it is necessary to

address the First Amendment freedom of speech rights that lawyers and all other persons are entitled to under the First Amendment to the United States Constitution.

In the October 6, 1983, letter, Attorney Snyder complained to the District Court secretary about problems he had encountered in the representation of indigents in the District Court. The letter was written at the secretary's suggestion. It vented a frustration of a practicing attorney towards a system which is not perfect.

Under the protections of the First Amendment, Attorney Snyder had the right to say what he did in the October 6, 1983, letter, without fear of reprisal. In the cases dealing with the subject of First Amendment rights, it is made clear that truthful criticism is protected by the First Amendment, subject to regulation only to the extent that it presents a clear and imminent threat to the fair administration of justice or involves conduct disruptive of the judicial proceeding. See *Craig v. Harney,* 331 U.S. 367 (1947); *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 352 (1940).

Regarding the constitutional standard applicable to the regulation of attorney's extrajudicial criticism of the judiciary, this court in *Bridges v. California, supra,* explained that clear and present danger,

> ". . . (I)s a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges v. California,* 314 U.S. 352, 363 (1940).

See also, *In Re*: *Hinds,* 449 A.2d 283 (NJ 1983).

A private letter written to the local federal district court judge's secretary does not rise to the level that it

can be said to be an imminent threat to the fair administration of justice or disruptive of a judicial proceeding.

While there is a reasonable restriction of freedom of speech within the court system, the communication of Attorney Snyder in his October 6, 1983, letter was not within the system. It is analogous to the situation found in *U.S. v. Grace,* 103 S.Ct. 1702 (1983), that situation involving picketing around the Supreme Court Building; and it was not considered by this court to be a comment *in* court, or directed to the court.

The comments of Attorney Snyder were in fact reasonable comments; they were not malicious, nor did they bring scorn upon the Court of Appeals or the District Court of the District of North Dakota. The situation found in *U.S. v. Grace* is not unlike that faced by Attorney Snyder. To find as the Court of Appeals did that Attorney Snyder could be suspended for what is said in the October 6, 1983, letter is a direct violation of his freedom of speech. There is no compelling government interest which is served by restricting the expression of individuals such as Attorney Snyder in commenting upon the Criminal Justice Act and its perceived failings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 31st day of July, 1984.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-8017

In the Matter of:)
Attorney Robert J. Snyder.)
On Order to
Show Cause.

Submitted: February 16, 1984
Filed: April 13, 1984

Before LAY, Chief Judge, HEANEY and ARNOLD, Circuit Judges.

LAY, Chief Judge.

This case comes before us on an order issued to attorney Robert Snyder of Bismarck, North Dakota, to show cause why he should not be suspended from practice in the federal courts. Attorney Snyder has been cited: (1) for his refusal to continue to perform services in indigent cases under the Criminal Justice Act (CJA) 18 U.S.C. §3006A (1982); and (2) for his disrespectful refusal to comply with the guidelines under the CJA relating to the submission of expenses and attorney fees.

Facts.

On March 14, 1983, Attorney Snyder was appointed by Judge Bruce Van Sickle of the District of North Dakota to represent an indigent defendant under the CJA. There is no issue concerning his services being performed competently. After the proceedings, pursuant to § 3006A (d)(4) of the CJA, Attorney Snyder submitted to the district court a claim for services and expenses in the amount of $1,898.55. On August 17, the district court judge reduced the claim by $102.50 and approved the modified request.

Under the CJA, the chief judge of this court must review and approve any expenditures for compensation in excess of the $1,000 limit. 18 U.S.C. § 3006A(d)(3). Snyder's application was deficient in that the CJA requires an attorney to attach a memorandum of hours expended and an itemized list of expenses.[1] Snyder did not attach the necessary information to his application. Accordingly, his application was returned to the district court with the request that Attorney Snyder provide the proper attachments. Thereafter, Snyder returned the application to the secretary of the district judge with a monetary, not an hourly, breakdown of his time and again without the requested itemization of expenses.[2] Once again his application was returned by the chief judge with the notation that compliance with the CJA guidelines was still necessary to process the application.

Snyder then sent to the district judge's secretary a letter, dated October 6, "for the purpose of responding to"

1. *Guidelines for the Administration of the Criminal Justice Act*, Ch. 2 §3, Vol. VII, Guide to Judiciary Policies & Procedures.

2. Snyder's note accompanying the returned application stated that "the amounts [on the time sheet] aren't exactly right due to our computer's lack of the right money codes."

the chief judge's request. Snyder stated that he was "appalled" at the small amount paid to attorneys for indigent criminal defense work. He indicated his displeasure at the "extreme gymnastics" required to receive "puny amounts." He then stated to the court: "We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it." Snyder concluded his letter by stating that he was "extremely disgusted" by the treatment of him by the Eighth Circuit, that he wished to be taken off the list of attorneys willing to accept appointment in indigent cases, and that he had "simply had it."[3]

Upon receipt of this information, the chief judge requested the district court to confer with Snyder and to determine if Snyder would retract his disrespectful remarks to the court. Snyder refused. On December 22, 1983, this court issued an order to show cause why he should not be suspended from the practice of law in the federal courts for his refusal to offer services under the CJA and to comply with relevant guidelines. Snyder requested a hearing by the full court. *See* Fed. R. App. P. 46(c). The full court voted to refer the matter to a panel.

At oral argument, Attorney Snyder was requested once again to purge himself, as an officer of the court, by agreeing to accept appointment under the Act and by otherwise complying with the Act's guidelines. The panel also requested him to demonstrate in writing that he would be respectful in his relations with the federal courts and to offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October

3. Based upon his refusal to comply with the CJA guidelines, Snyder was denied excess attorney fees and denied unitemized expenses.

6. Snyder conditionally offered his continued services under the CJA, but contumaciously refused to retract his previous remarks or apologize to the court.

Attorney Snyder's Remarks to the Court

We first turn to Snyder's refusal to comply with the guidelines under the CJA for documentation of expenses. An integral part of Snyder's refusal to comply with CJA guidelines was his explicit statement of disrespect to the federal court. Snyder's conduct not only constituted disrespect but served as well to impede the orderly processing of attorney fee applications. In this direct sense he has served to impede the administration of justice.

As a member of the North Dakota bar and as a licensed practitioner in both the federal district court and the court of appeals, Attorney Snyder is bound by the ethical canons of the legal profession.[4] The relevant disciplinary rule states: "A lawyer shall not: . . . Engage in conduct that is prejudicial to the administration of justice." The Model Code of Professional Responsibility, DR 1-102(A)(5).[5] Equally important is the recognition that an attorney must maintain the proper respect for the court as an institution. As stated in the Model Code:

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4. The ethical code adopted by each state defines the professional responsibility of every attorney who is a member of that state's bar. However, as a federal court, our authority to discipline Attorney Snyder is defined in Fed. R. App. P. 46(c):

> Disciplinary Power of the Court over Attorneys. A court [of] appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

5. Although the American Bar Association has recently adopted new Model Rules of Professional Conduct, the older Model Code of Professional Responsibility is still in effect in North Dakota (the state in which Attorney Snyder practices).

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Id. at EC 9-6.

As we will discuss, Snyder now conditionally has offered to serve in indigent cases and to comply with the CJA guidelines. However, in a letter to the court he has otherwise refused to retract or apologize for his disrespectful remarks to the court. He asserts that, although his remarks were "harsh," as a "matter of principle" no further statement is due the court. Letter from Robert J. Snyder to Chief Judge Lay (February 27, 1984).

We find Snyder's present statement that he will conditionally comply with the guidelines not enough. His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts. All courts depend upon the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of govern-

ment as an institution by lawyers, the law cannot survive.[6] This is not to say that courts cannot and should not be subject to proper criticism and comment; however, when an attorney becomes disrespectful in response to a court's request that counsel comply with a congressional mandate, then we deal with a different matter. Without hesitation we find Snyder's disrespectful statements as to this court's administration of CJA contumacious conduct. We deem this unfortunate.

We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter Snyder should make application to both this court and the federal district court of North Dakota to be readmitted.

Implementation of the CJA in North Dakota

In further response to the show cause order Attorney Snyder alleges that the implementation of the CJA in North Dakota relies exclusively on an attorney list of those "willing" to serve. He therefore asserts that his refusal to accept any future CJA cases was in compliance

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6. It is not respect for the judge personally that is required of attorneys; it is respect for the legal institution that the judge represents. As the Supreme Court of Pennsylvania recently stated:

> The "law" is given corporeal existence in the form of the judge. When carrying out the judicial function, the judge becomes a personification of justice itself. When presiding over any aspect of the judicial process, the judge is not merely another person in the courtroom, subject to affront and insult by lawyers. "The obligation of the lawyer to maintain a respectful attitude toward the court is 'not for the sake of the temporary incumbent of the judicial office,' but to give due recognition to the position held by the judge in the administration of the law." ABA Standards, The Defense Function, § 7.1, Commentary at 259. The judge is the court, and a display of insolence and disrespect to him is an insult to the majesty of the law itself.

Commonwealth of Pennsylvania v. Rubright, 414 A.2d 106, 110 (Pa. 1980).

with the plan and that he should not be censured for his lack of willingness to serve any more than the vast number of lawyers within the district who were not on the list by reason of their unwillingness to serve. Second, Snyder asserts that, because he lives in a rural area with a smaller population and his firm is willing to try criminal cases, whereas the vast number of lawyers in the district are not so willing, his firm receives a disproportionate number of appointments under the CJA. He also protests that the statutory fee under the CJA is inadequate to compensate him even for his overhead. Third, Snyder complains that the North Dakota list of attorneys willing to serve is not a current list; it does not include lawyers newly admitted to the bar and includes a number of lawyers who are deceased or inactive. He asserts, however, that he is now willing to continue to serve on the CJA panel provided that other qualified attorneys are placed on the list for appointment. We find merit in Snyder's conditional offer of service.

This court has consistently recognized the duty of an attorney practicing in the federal courts, as an implied obligation, to serve willingly as an officer of the court in a capacity *pro bono publico* (for the public good). *See, e.g., Peterson v. Nadler*, 452 F.2d 754, 758 (8th Cir. 1971). In the case of *Tyler v. Lark* we noted:

> "An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' "

Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir.) (quoting *United States v. Dillon*, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966)), *cert. denied*, 414 U.S. 864 (1973).

Many state courts have similarly observed that counsel must assist the court by carrying on *pro bono* representation in criminal cases. *See, e.g., Ex parte Dibble*, 310 S.E.2d 440, 441 (S.C. Ct. App. 1983) ("It has been traditionally held that a lawyer, by accepting a license to practice law, becomes an officer of the court and assumes the obligation of representing, without pay, indigent defendants in criminal cases."); *Yarbrough v. Superior Court of Napa County*, 150 Cal. App. 3d 388, ..., 197 Cal. Rptr. 737, 741 (Ct. App. 1983) ("An attorney is an officer of the court before which he or she was admitted to practice and is expected to discharge his or her professional responsibilities [to represent indigents] at all times, particularly when expressly called upon by the courts to do so."). Recently, the Supreme Court of Missouri held that attorneys licensed to practice in the state could be appointed to serve in criminal cases with no compensation:

> "The term 'profession,' it should be borne in mind, as a rule is applied to a group of people pursuing a learned art as a common calling in the spirit of public service where economic rewards are definitely an incidental, though under the existing economic conditions undoubtedly a necessary by-product. In this a profession differs radically from any trade or business which looks upon money-making and personal gain as its primary purpose. The lawyer cannot possibly get away from the fact that his is a public task. . . ."

State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. 1981) (quoting Anton-Hermann Chroust, 1 *The Rise of the Legal Profession in America* x-xi (1965)), *cert denied*, 454 U.S. 1142 (1982).

The profession of law rests upon its commitment to public service and has long been recognized as a profession that requires its membership to engage in *pro bono* activities. Acceptance of appointment under the CJA, a service that lawyers do not perform totally without compensation, is consistent with this obligation of the members of the bar.[7] Before the CJA provided for compensation, many lawyers willingly accepted the defense of indigents in federal criminal cases without expectation of any compensation. The CJA was a recognition by Congress that indigent criminal defendants should have an opportunity to receive the services of competent counsel. Although the compensation allowed by the Act was never intended to fully recompense the lawyer for the time spent on a case, Congress intended that the amount allowed would at least approach the cost of a lawyer's overhead. It is true that the allowances awarded are much lower than the fees charged by many lawyers in non-indigent cases. However, the Act is intended to contain elements of *pro bono* work and not to be merely a government-subsidized, employment service.[8]

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7. Although some compensation is afforded an attorney under the CJA, the Act does not attempt to fully compensate an attorney for the work performed. Thus, the Act has a *pro bono* factor built into its compensation scheme. *See infra* note 8 and accompanying text.

8. The legislative history of the CJA states:

> As reported by the subcommittee, H.R. 4816 provided for compensation to court-appointed attorneys at a rate not to exceed $15 per hour for time reasonably spent, and carefully accounted for, on behalf of an impoverished defendant. This amount was conceded by virtually every witness at the hearings to be below normal levels of compensation in legal practice. It was nevertheless widely supported as a reasonable basis upon which lawyers could carry

(Continued on following page)

The North Dakota plan which contemplates that only lawyers who willingly volunteer for appointments will be assigned to indigent cases appears to rest on the Model Plan approved by the Criminal Justice Committee of the Judicial Conference.[9] Nonetheless, we find that Snyder's objections raise considerable concern as to the efficacy of any plan which depends totally upon voluntary participation.[10]

We find merit in the reasoning that there is an implied obligation to perform *pro bono* trial services on every licensed attorney who is engaged in litigation, not just those who are willing to come forward. The plan as now constituted penalizes those who specialize in criminal law because more than their share of the district's *pro bono* work falls on their shoulders; under a voluntary plan, particularly in rural areas, only a few attorneys come forward and this unduly results in a disproportion of assignments to a minority of the lawyers practicing in the district. Also, appointing only those who feel they have competence in criminal cases in no way assures competency; it is common knowledge that many counsel ap-

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Footnote continued—

> out their profession's responsibility to except [sic] court appointments, without either personal profiteering or undue financial sacrifice. . . .

H.R. Rep. No. 864, 88th Cong., 2nd Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2997-98. Since the enactment of the CJA, the hourly rate of compensation for attorneys has increased to $20 for preparation time and $30 for trial time.

9. "Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys under the Criminal Justice Act," *Guidelines for the Administration of the Criminal Justice Act*, Vol. VII, App. G, Guide to Judiciary Policies and Procedures.

10. We note that, in districts where a federal public defender program assumes a substantial representation of indigents in criminal cases, the plan adopted may be more flexible in accepting volunteers.

pointed by district courts under the CJA are young lawyers just out of law school trying to gain early experience in the trial of cases.

Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan. However, his conditional agreement to serve in the future, if other attorneys who are competent to try cases are included on the panel, also has considerable merit. Under the Criminal Justice Act each district is required to submit for approval its plan for implementation of the CJA to the Judicial Council of the Circuit. 18 U.S.C. § 3006A(a). We therefore refer the study as to alleged insufficiency of participation of the bar in the panels of the CJA to the district courts and the Judicial Council.

We recognize that any requirement that all active, licensed trial practitioners be eligible for appointment under the CJA raises the immediate question of competency and the continuing concern of the courts and the bar over the increasing number of suits relating to the charge of ineffective assistance of counsel in criminal cases. But in our judgment the fear of incompetent counsel being appointed is, for the most part, exaggerated.

The most common successful complaint relating to ineffective assistance of counsel is the failure of the lawyer to adequately investigate the case and to call defense witnesses. *See, e.g., United States v. Baynes*, 687 F.2d 659 (3rd Cir. 1982); *Eldridge v. Atkins*, 665 F.2d 228 (8th Cir. 1981), *cert. denied*, 456 U.S. 910 (1982); *Rummel v. Estelle*, 590 F.2d 103 (5th Cir. 1979). Competent lawyers who specialize in civil trials know that the success or failure of a trial depends on the thoroughness of the investigation of facts and of the trial preparation. This basic rule of trial prep-

aration is true for civil as well as criminal cases; the attorney who is competent to practice in civil matters is competent to appear in criminal cases. Lawyers who specialize in civil cases must necessarily engage in a diversity of study in all spheres of our social, political, and economic systems. The step across to the criminal law, by the experienced civil trial attorney, is really no step at all.

We also recognize that many civil trial lawyers are not currently conversant with the Rules of Criminal Procedure and the various rules governing the practice of criminal law.[11] Nonetheless we would deem it incumbent on the civil trial bar to become familiar with these rules, as they would any other procedural or substantive rule of law not previously encountered. Most civil lawyers are generalists; when confronted with a specialized area of litigation, they quickly master the law and the facts. Few lawyers process their first appeal to this court or to the Supreme Court of the United States without doing special study to master the new procedure at hand. We suggest that it is no more difficult to conduct a criminal trial than it is to conduct an intricate 10b-5 securities case or a complicated products-liability case.

Much of the criticism that has been leveled at the trial bar as to the lack of effective representation has focused on lawyers representing indigents in criminal

---

11. The Model Plan provides:

> Attorneys who serve on the CJA Panel must be members in good standing of the federal bar of this district, and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

We note, generally, that knowledge of the Federal Rules of Criminal Procedure and Federal Rules of Evidence is necessary to pass most state bars. It is reasonable to assume that a lawyer may be called upon some day to use the skills which he or she was required to demonstrate to enter the legal profession.

cases.[12] While ineffective assistance of counsel certainly can occur in appointed-counsel cases, charges of incompetency of the criminal trial bar are distorted by the placing of the burden of indigent representation totally on a small segment of the bar. Skilled and experienced civil trial attorneys, some of the best advocates in the profession, are excused from service under the CJA by the Model Plan and district plans adopted in conformity therewith. It is immaterial whether their absence is related to the lack of economic incentive to serve under the CJA or to their alleged lack of experience in the criminal field. Clearly, when such a large number of competent trial attorneys are categorically removed from participation, ser-

---

12. For example, Chief Justice Burger has expressed concern that indigents suffer most from "incompetent trial advocates." Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel*, 49 Fordham L. Rev. 1, 8 (1980). Judge Bazelon, a distinguished jurist of the D.C. Circuit, has been critical of the competency of the criminal defense bar for years. *See, e.g.*, Bazelon, *The Defective Assistance of Counsel*, 42 U. Cin. L. Rev. 1 (1973). Our opinion disagrees with Judge Bazelon's views that civil trial lawyers are not competent to try criminal cases. Judge Bazelon states that the time and money spent by a civil lawyer in learning how to try a criminal case "would be immense" and that too many of these lawyers would have to "rediscover the wheel." He also adds that the "uptown lawyer" often has a serious communication problem with the indigent client and that they are "not prepared for the cultural shock of learning that their client is neither middle class nor cast in their image of the 'deserving poor.'"

We must respectfully disagree. There is no empirical data to support Judge Bazelon's theory. The fact is, the present system of allowing only volunteers to come forward for appointment under the CJA brings forth many inexperienced, young lawyers looking for their first case to try. Appointing only those who specialize in criminal cases conveniently shields a vast number of experienced lawyers who seek an exclusive, civil practice because of the higher monetary rewards involved. The CJA is not designed to compensate any lawyer for his or her self-education. Nonetheless, we are confident that skilled civil trial lawyers could adjust to criminal practice, first, out of the professional obligation to provide effective counsel for the defendant; and second, out of concern for the quality of representation to be found generally in our courts and our profession.

vices rendered to indigents will not consistently meet the highest standards of criminal representation. We do not believe that Congress, in passing the CJA, intended *pro bono* representations to fall upon the few; in this sense we think careful study by the district courts and the Judicial Council should be given to the idea that all active trial lawyers in the federal courts be obligated to provide *pro bono* services to the indigent either in the civil law or in the criminal defense field. *Cf. Nelson v. Redfield Lithograph Printing*, No. 83-2248 (8th Cir. Feb. 22, 1984).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

/s/ Robert D. St. Vrain

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-8017

In the Matter of:) On Petition for
Attorney Robert J. Snyder) Rehearing En Banc.

Filed: May 31, 1984

ORDER DENYING PETITION FOR REHEARING EN BANC

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges.

HEANEY, Circuit Judge.

This matter comes before the Court on a petition for rehearing en banc. Attorney Snyder, now represented by counsel, raises several points in his petition: (1) that Chief Judge Lay should recuse himself under 28 U.S.C. § 455(b)(1) because of his personal knowledge of facts gained under the Criminal Justice Act (CJA); (2) that Snyder was not given proper notice that his allegedly disrespectful letter could be a basis for discipline; (3) that Snyder's letter of complaint was an exercise of free speech protected by the First Amendment; (4) that his letter was not disrespectful; and (5) that the district court and the court secretary encouraged Mr. Snyder in directing that the letter of complaint be sent.

Before dealing with these arguments, we think it wise to state the facts more precisely. Robert Snyder was appointed by the United States District Court for the District of North Dakota to represent 12 defendants in a period from January 1, 1979 to early 1984. It appears from the record that eight of these cases were disposed of without trial and four involved at least some court appearances. According to the records that have been furnished to this Court, Mr. Snyder devoted approximately 270 hours to these cases over a four and one-half year period.

On August 9, 1983, Mr. Snyder completed work on a case in which he had been appointed to represent an indigent, and submitted a voucher in the sum of $1,898.55 to the district court for payment. Judge Bruce Van Sickle reduced the claim by $102.50 and forwarded this voucher to this Court on August 17. On September 6, this Court returned the voucher to Mr. Snyder requesting him to submit a detailed memorandum pursuant to 22.2 B of the guidelines, and to support his claim for long distance calls by attaching an itemized statement. The voucher was returned to us on September 26, but because he did not have both the number of hours expended as well as the dollar amounts, requested by the guidelines, it was returned by this Court to Mr. Snyder on the same date. On October 20, the completed voucher was returned to this Court. Included in the return was Mr. Snyder's letter of October 6; this letter is attached hereto as Addendum No. 1. The letter stated in part:

> We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.
>
> Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and

> you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

On November 3, 1983, Chief Judge Lay wrote to Judge Van Sickle the letter which is attached hereto as Addendum No. 2 A copy of this letter was sent to Mr. Snyder. In that letter Chief Judge Lay stated in part:

> I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.
>
> • • • •
>
> Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be appointed to represent indigent criminal defendants. As far as the court is concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made.

On December 20, 1983, Chief Judge Lay caused to be issued the order to show cause which forms the basis of the present proceedings. A hearing on the order to show cause was held on February 15, 1983. At the hearing

to show cause, Judge Richard Arnold read excerpts of Snyder's letter of October 6 to Mr. Snyder and asked Mr. Snyder the following question: "I am asking you sir if you are prepared to apologize to the Court for the tone of your letter." Mr. Snyder responded as follows: "That is not the basis that I am being brought forth before the Court today. It is not an apology and I could have apologized when an apology was demanded from Judge Lay and I declined * * * but I did not apologize then and I am not apologizing now." Judge Arnold stated to Mr. Snyder: "I just want to get this clear that you are declining to apologize for the letter of October 6." Snyder said: "I am." At the close of the hearing the Court gave Mr. Snyder an additional ten days in which to state that he was willing and ready to represent indigent defendants, that he would comply with the guidelines, and that he would apologize to the Court for his letter of October 6.

On February 22, Snyder wrote to this Court stating:

> If and when a new Plan for the implementation of the Criminal Justice Act in the State of North Dakota is enacted, the undersigned will enthusiastically obey its mandates, just as he has obeyed the mandates, or lack thereof, in the existing Plan.
>
> Further, the undersigned states that he will make every good faith effort possible to comply with the Court's guidelines regarding the payment of attorney's fees and expenses. [*See* Addendum No. 3.]

No apology for the October 6 letter was made. Thereafter, on February 24, 1984, Chief Judge Lay wrote to Mr. Snyder giving him another opportunity to apologize. He stated: "I am confident that if such a letter is forthcoming that the Court will dissolve the order." *See* Addendum No. 4.

Mr. Snyder responded as follows:

> I am in receipt of your letter dated February 24, 1984. Please be advised that my letter of February 22, 1984 entirely states my position concerning this matter.
>
> I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. You must therefore search your conscience and determine what course of action will best serve the interest of justice and the administration of the Eighth Circuit.
>
> It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on principle, one must be willing to accept the consequences.
>
> Thank you for your time and attention.

We turn now to the arguments raised by Snyder on his petition for rehearing en banc. We deal with them seriatim.

First, it is clear that a judicial officer is not disqualified under 28 U.S.C. § 455 because of personal knowledge of facts unless the knowledge arises out of extra-judicial observation or misconduct. *See United States v. Coven*, 662 F.2d 162, 168 (2d Cir. 1981), *cert, denied*, 456 U.S. 916 (1982). Chief Judge Lay, in processing Snyder's claim and in seeking information to process the claim, was carrying out his judicial responsibilities. Any factual information gained in doing so or any judicial action taken by him as chief judge did not in any way arise, in an extra-judicial capacity. Chief Judge Lay possesses no personal bias against Snyder and properly served on the panel to hear Mr. Snyder's response to the Court's show cause order.

Second, it is abundantly clear from the record that Snyder had notice that his disrespectful letter could be a basis for discipline. Snyder was given at least three opportunities to apologize for the letter and declined to do so.

Third, Snyder's counsel states that Mr. Snyder's letter was an exercise of free speech. Snyder urges that he should not be disciplined for exercising his First Amendment rights to criticize, and express frustration toward, the Court. The gravamen of the situation is that Snyder in his letter became harsh and disrespectful to the Court. It is one thing for a lawyer to complain factually to the Court, it is another for counsel to be disrespectful in doing so.

It is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech. As Justice Stewart stated: "Obedience to official precepts may require abstention from what in other circumstances might be constitutionally protected speech." *In re Sawyer*, 360 U.S. 622, 646-647 (1959) (Stewart, J., concurring).[1]

Fourth, Snyder states that his letter is not disrespectful. We disagree. In our view, the letter speaks for itself.

Snyder seeks to mitigate his conduct by stating that the district court and the district court's secretary directed

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1. *See also State v. Nelson*, 504 P.2d 211, 214 (Kan. 1972), which states:

> Concerning respondent's argument that DR 1-102(A)(5) creates an impermissible and chilling effect on "First Amendment freedoms," an examination of decisions on the point (12 A.L.R.3d, Anno., p. 1408) reveals the consensus to be that an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held.

that the letter be sent. It appears from the affidavit of Judge Bruce Van Sickle that he was aware of Mr. Snyder's letter to his secretary and viewed it as that of a frustrated lawyer hoping that his comments with respect to the fee schedule and the paperwork would serve as a basis for some change in the process. There is nothing in the record to indicate that Judge Van Sickle instructed Mr. Snyder to be disrespectful to this Court. Snyder wrote the letter, he is intelligent and capable of independently evaluating the ramifications of his conduct, and he must take responsibility for his own actions.

We have difficulty with the proposition that we should condone, or that anyone should approve, a lawyer's exercise of open disrespect for the court before which the lawyer practices. To repeat what we have earlier observed, "a display of insolence and disrespect to [the Court] is an insult to the majesty of the law itself." *In the Matter of: Attorney Robert J. Snyder*, No. 84-8017, slip op. at 6 n.6 (8th Cir. April 13, 1984). However, because of Snyder's past cooperation with the district court in serving on *pro bono* matters, because of his now professed willingness to continue to do so and to comply with the CJA guidelines, and because of the alleged misunderstanding as to the reasons for his suspension—we conditionally vacate the panel's order of suspension and provide an additional 10 days from the date of this order for Attorney Snyder to provide a sincere letter of apology to this Court for the disrespectful comments directed to the Court in his letter of October 6, 1983, sent to Judge Van Sickle's secretary. The clerk is directed that if Snyder fails to comply with this request, our original order of suspension will be reinstated with the six month suspension to run from the date of the original order. The Clerk is further directed to send a copy of this order to each of

the lawyers who signed the petition for rehearing en banc and to the president and secretary of the Burleigh County Bar Association.

The petition for rehearing en banc is denied on the ground that the majority of judges in regular active service did not vote to grant the petition as required by Fed. R. App. P. 35.

BRIGHT and McMILLIAN, Circuit Judges, would grant the petition for rehearing en banc.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

ADDENDUM NO. 1

BICKLE, COLES AND SNYDER, CHARTERED
Attorneys at Law
219½ East Broadway
The Little Building
P.O. Box 2071
Bismarck, North Dakota 58502-2071

Gregory L. Bickle
James J. Coles
Robert J. Snyder

Telephone
(701) 258-1611

October 6, 1983

Helen Monteith
Federal Building
3rd Street & Rosser Avenue
Bismarck, ND 58501

Re: United States of America vs. Dennis Warren

Dear Helen:

I am in receipt of the letter of September 26, 1983, from the Eighth Circuit Court of Appeals, in which our latest attempt to justify our time and expenses for Dennis Warren has again been set back. This letter is for the purpose of responding to that letter.

In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED

/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

APPENDIX C

BICKLE, COLES AND SNYDER, CHARTERED
Attorneys at Law
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The Little Building
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Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED

/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

APPENDIX D

UNITED STATES COURT OF APPEALS
Eighth Circuit

Donald P. Lay
Chief Judge
P. O. Box 30908
St. Paul, Minnesota 55175

November 3, 1983

The Hon. Bruce M. Van Sickle
United States District Judge
P. O. Box 670
Bismarck, North Dakota 58501

Re: C1-83-4-01. U.S.A. v. Dennis Warren.

Dear Judge Van Sickle:

I am enclosing copies of recent correspondence of attorney Robert J. Snyder to your secretary, Helen Montieth, and from your secretary to my administrative assistant, June Boadwine. It is unfortunate that this matter now requires additional time, but because of the responses made by your secretary and Mr. Snyder, it is necessary for me to intervene.

I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.

The Criminal Justice Act was passed as a response to the inadequacy of a prior system which did not award any type of reimbursement of expenses or time spent by a lawyer. I'm confident it was true when you were in practice as it was when I represented indigents that the bar performed without any reimbursement of either expenses

or attorneys' fees. This pro bono work was considered to be a part of our professional responsibility. The CJA was never intended to provide a reasonable attorney fee, only to provide funds to cover overhead and expenses.

Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, my concern now is related to the apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it. In the original instance, Mr. Snyder failed to forward any time itemization, contrary to the statutory guidelines, and on that basis and based upon my direction to my administrative assistant, the claim for services was returned to you with the request that compliance be obtained. Mr. Snyder then itemized the amounts in dollars, but failed, as requested by the Administrative Office, to set forth the number of hours or portions of hours in each instance on his itemized schedule.

We were unable to ascertain whether he was charging time under his own fee schedule or that of the statute. In addition, he failed to itemize his out-of-pocket expenses on a separate sheet. Although these requirements may seem technical, under the Criminal Justice Act the federal government is dealing in millions of dollars and Congress requires proper itemization so that budgetary limitations may be accounted for in a proper manner.

As you know, processing these vouchers takes a good deal of time on my part, as well as on the part of every district judge who must approve them. If a district judge's staff is to assist, it is essential they understand the guidelines and require attorneys to comply with them. If a voucher is not properly submitted and checked by the district court, it requires a great deal of time on my part in getting ultimate approval of it by the Administrative Office. Volume

VII of the Guide to Judiciary Policies and Procedures contains the guidelines. However, when a lawyer becomes disrespectful and refuses to follow the guidelines and refuses to cooperate with the court, then it is a more significant problem.

Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be appointed to represent indigent criminal defendants. As far as the court is concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made.

In view of Mr. Snyder's attitude and refusal to assist the court in processing this voucher under the guidelines, I am approving a fee for him only to the statutory limit and properly itemized expenses.

Before taking the steps noted above, I would appreciate your views on the matter.

Sincerely,

/s/ Donald P. Lay
Donald P. Lay

/j

Encls.

cc: Mr. Robert Snyder

Encls.

APPENDIX E

(Filed December 22, 1983)

UNITED STATES COURT OF APPEALS
for the Eighth Circuit

Re: ROBERT J. SNYDER) ORDER TO SHOW CAUSE

On October 6, 1983, Robert J. Snyder, a duly licensed attorney in the State of North Dakota, requested the United States District Court of the District of North Dakota to remove his name from the list of attorneys who will represent indigent criminal defendants. His refusal to defend criminal indigents appears to be based partly on his contention that the attorneys' fees allowable to court-appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A, do not afford reasonable compensation. Mr. Snyder also has refused to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorneys' fees.

On November 15, 1983, as Chief Judge of this court, I instructed United States District Judge Bruce M. Van Sickle to remove Mr. Snyder's name from the list of attorneys in North Dakota who are eligible to be appointed to defend indigents in criminal cases.

In *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982), this court recognized the inherent duty and obligation of a lawyer, as an officer of the court, to represent indigents without fee. This court relied, in part, *on United States v. Dillon*, 346 F.2d 633, 635-36 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966), wherein the court stated:

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one

of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services." Cf. Kunhardt & Company, Inc. v. United States, 266 U.S. 537, 45 S.Ct. 158, 69 L.Ed. 428 (1925).

In Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), the Supreme Court held, in a capital case where the defendant was unable to employ counsel and was incapable of making his own defense adequately because of ignorance, etc., that it was the duty of the court to assign counsel for him, and stated at page 73, 53 S.Ct. page 65:

> "Attorneys are officers of the court, and are bound to render service when required by such an appointment."

346 F.2d at 635 (footnote omitted).

In view of Mr. Snyder's refusal to carry out his obligations as a practicing lawyer and as an officer of this court, he is HEREBY ORDERED TO SHOW CAUSE within thirty days of this Order as to why he should not be suspended from practice in the federal district court, as well as in the United States Court of Appeals for the Eighth Circuit, for such period of time as his refusal to serve continues. Pursuant to Rule 46 of the Federal Rules of Appellate Procedure, Mr. Snyder may request a hearing on his response before the full court. He shall file his response with the Clerk of the United States Court of Appeals for the Eighth Circuit in St. Paul, Minnesota.

IT IS SO ORDERED.

/s/ Donald P. Lay
Chief Judge

Dated December 20, 1983.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-8017

In the Matter of:) On Order to Show
Attorney Robert J. Snyder.) Cause

PETITION FOR REHEARING IN BANC

RULE 16(d) 8th CIR.R. REQUIRED STATEMENT

We express a belief, based on a reasoned and studied professional judgment, that this appeal raised the following questions of exceptional importance: (1) denial of due process, (2) failure to disqualify pursuant to 28 USC §455, (3) denial of First Amendment rights.

PETITION FOR REHEARING IN BANC

COME NOW the undersigned, on behalf of Robert J. Snyder and pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and hereby respectfully petition the full court for a rehearing in banc for the purpose of addressing the order and judgment of suspension of Robert J. Snyder entered by the Eighth Circuit Court of Appeals on April 13, 1984.

The rehearing in banc is sought upon the following grounds.

I.

That the order of suspension is based upon matters which were not a part of the Order to Show Cause issued

by the Eighth Circuit Court of Appeals, dated December 20, 1984. Accordingly, Mr. Snyder has not been accorded due process which requires: (1) Notice, (2) Opportunity to be heard, and (3) A meaningful hearing on the matters which serve as a basis for the suspension.

II.

That the Order to Show Cause advised Mr. Snyder that, pursuant to Rule 46 of the Federal Rules of Appellate Procedure he could request a hearing on his response before the full court which request was made by Mr. Snyder but was denied by Chief Judge Lay. A Motion was filed by Robert J. Snyder requesting that Chief Judge Lay not sit on the panel, which motion was denied. The opinion ordering suspension was drafted by Chief Judge Lay. It is respectfully submitted that Chief Judge Lay should have recused himself from the hearing panel and any consideration of the matter because of the provisions of 28 U.S.C. §455.

III.

Suspension of Mr. Snyder, based upon the content of the letter dated October 6, 1983, to Helen Monteith, secretary to the Honorable Bruce M. Van Sickle would be in derogation and violation of Mr. Snyder's First Amendment rights.

ARGUMENT

This matter arises from a situation where Mr. Snyder was appointed to represent an indigent in the Southwestern Division in the District of North Dakota in 1983. Mr. Snyder submitted his vouchers for payment which were returned for additional information on several occasions by the Circuit Court. As a result of his difficulty regarding

submission of his vouchers, Mr. Snyder spoke with Helen F. Monteith who suggested to Mr. Snyder that he write a letter to her office stating his concerns regarding the frustration of counsel in representing indigent defendants and being compensated for it. (See Affidavit of Helen F. Monteith attached hereto as Exhibit A.) Helen F. Monteith then showed the letter to Judge Bruce M. Van Sickle and, at his direction, she sent it on to the Circuit Court. Judge Van Sickle did, in fact, review the letter and discussed the letter with Mr. Snyder. (See Judge Van Sickle Affidavit attached hereto as Exhibit B). Judge Van Sickle did not view the letter as one of disrespect for the court but rather one of a somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process. Judge Van Sickle and Helen F. Monteith both share in their affidavits that they did not regard the letter as one of disrespect for the court, or as showing a disrespect for the federal court system and both state that during the period of time that Mr. Snyder has been appearing before Judge Van Sickle he has always shown the highest respect to the court system and to Judge Van Sickle.

In any event, the letter dated October 6, 1983, which is a part of the court's record in this matter was sent to the Circuit Court of Appeals. On November 3, 1983, Chief Judge Lay addressed a letter to the Honorable Bruce M. Van Sickle referencing the letter Snyder wrote to Helen F. Monteith, which letter is also a part of the record in this case, which letter contained statements of Chief Judge Lay that:

> [I] consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts. . . .

The letter continued by stating:

> [I] question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an Order to Show Cause as to why he should not be suspended from practicing in any federal court in this district for a period of one year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made. . . .

Chief Judge Lay, on December 20, 1983, did issue an Order to Show Cause which Order to Show Cause specifically stated:

> [H]e is hereby ordered to show cause within thirty (30) days of this order as to why he should not be suspended from practice in the federal district court, as well as in the United States Court of Appeals for the Eighth Circuit, for such period of time as his refusal to serve continues. Pursuant to Rule 46 of the Federal Rules of Appellate Procedure, Mr. Snyder may request a hearing on his response before the full court.

The Order to Show Cause thus directed Mr. Snyder to show cause why he should not be suspended from the practice because of his refusal to serve as a lawyer representing indigents in the district of North Dakota. As a result of that specific directive, Mr. Snyder prepared a lengthy response which response included copies of the Criminal Justice Act for the District of North Dakota which had previously been approved by the Eighth Circuit Court of Appeals, showing that under the provisions of that act and its implementation that his stated refusal to serve as counsel for indigents from that time forward

was allowed by the plan and, in fact, the statistics indicated that approximately 200 of some 275 lawyers in the Southwestern District of North Dakota had also, for various reasons, chosen not to serve on the panel. Mr. Snyder also requested a hearing before the full court as he had been advised in the Order to Show Cause that he could do.

A hearing was scheduled, but not before the full court, but before a three judge panel which included Judge Heaney, Judge Arnold and Judge Lay. Mr. Snyder upon being advised that the panel included Chief Judge Lay did enter a demand that Chief Judge Lay recuse himself because of his involvement in the matter through letters to the federal judges in the District of North Dakota and, specifically, the letter of November 3, 1983, to the Honorable Bruce M. Van Sickle, portions of which have been quoted above.

The hearing was held in St. Paul on February 16, 1983, at which time and date Mr. Snyder appeared pro se but was accompanied by an attorney who was directed by the Burleigh County Bar Association to file a Resolution of the Burleigh County Bar Association with the court which is a part of the court's file in this matter. A copy of the Bar's Resolution is attached hereto and made a part hereof as Exhibit C.

The Return which was filed by Mr. Snyder was in direct response to the Order to Show Cause and explained the basis and reason that Mr. Snyder should not be suspended for having determined that he would not serve on the panel for indigent defendants. Nothing was included in the return regarding Mr. Snyder's guaranteed First Amendment rights of free speech, because the Order to Show Cause did not mention or direct that he show

cause why he should not be suspended because of the content of the letter to Helen Monteith, dated October 6, 1983.

At the hearing on February 6, 1984, the bulk of the discussion centered on the content of the letter to Helen Monteith, dated October 6, 1983. The panel did indicate that their review of the North Dakota District Plan indicated that some revision was required.

At the conclusion of the hearing, the panel advised Mr. Snyder that he would be suspended from the practice in the federal courts unless, within ten (10) days, he submitted a letter to the court indicating that: 1. He would agree to serve on the panel under a newly revised plan, and 2. That when so serving he would comply with the guidelines in effect for the submission of billings for his services, and 3. That he retract or apologize for the language contained in the October 6, 1983, letter to Helen Monteith.

Mr. Snyder has agreed to items 1 and 2 and has sent such a letter to the court; however, he has refused to retract or apologize for the remarks in the letter.

Accordingly, on April 13, 1984, Chief Judge Lay authored an opinion for the panel which states at page 6 thereof:

> We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six (6) months; thereafter Snyder should make application to both this court and the Federal District Court of North Dakota to be readmitted.

It is respectfully submitted that the Order of Suspension should not be entered for various reasons which have

been itemized above and which will be amplified upon hereafter.

In the first place, the Order to Show Cause specifically stated that he was to show cause why he should not be suspended from the practice "[F]or such period of time as his refusal to serve continues. . . ." In the opinion issued by the Circuit Court Panel, it is stated that Snyder was ordered to show cause why he should not be suspended from practice in the federal courts and the opinion states:

> Attorney Snyder has been cited:
>
> (1) For his refusal to continue to perform services in indigent cases under the Criminal Justice Act (CJA) 18 U.S.C. §3006A (1982); and
>
> (2) For his disrespectful refusal to comply with the guidelines under the CJA relating to the submission of expenses and attorney's fees.

It is apparent that the above quoted language in the Order of Suspension is vastly different than the directive in the Order to Show Cause. Additionally, it is clear from the language in the opinion that the basis for the court's ordering the suspension of Snyder was for his refusal to "Offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October 6th." (Page 3.) And, at page 6 of the opinion it is stated that "without hesitation we find Snyder's disrespectful statements as to this court's administration of CJA contumacious conduct." It then follows, in the next paragraph, that he is ordered suspended.

It is Snyder's position that he has been denied due process in that the Order to Show Cause was not directed to the language contained in the letter and, therefore, in his Return to the Order to Show Cause he made no

reference to it nor argument in respect to it. Had the Order to Show Cause stated that he was to show cause why he should not be suspended from practice because of the statements contained in the letter the Return to the Order to Show Cause would have referenced the First Amendment to the Constitution and the numerous decisions regarding freedom of speech.

Accordingly, it is respectfully submitted that Snyder has now been suspended because of the content of the letter without having had the due process of law because as to the content of the letter he has not been afforded: (1) Proper notice, (2) Opportunity to be heard, and (3) A meaningful hearing. He was not advised in the Order to Show Cause that the matters contained in the letter were to serve as the basis for a possible suspension and, therefore, he did not have an opportunity to appropriately respond.

Additionally, it is respectfully submitted that Chief Judge Lay should have recused himself in the consideration of this matter because of the provisions of 28 U.S.C. §455 which state in pertinent part as follows:

> Disqualification of justice, judge, magistrate or referee in bankruptcy.
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> a. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

The language of that statute is also a part of Canon 3C. of the Model Rules of Professional Conduct and Code of Judicial Conduct which states in pertinent part as follows:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, included but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings; . . .

It is respectfully submitted that Judge Lay's initial involvement in the matter before the issuance of the Order to Show Cause does bring into play the provisions of 28 U.S.C. §455 because he did have personal knowledge of facts concerning the proceeding.

Snyder did request that Chief Judge Lay recuse himself, however, Chief Judge Lay did not recuse himself and, in fact, sat as the Chief Judge of the panel and, subsequently, wrote the opinion suspending Mr. Snyder for a period of six (6) months.

In Chief Judge Lay's letter to the Honorable Bruce M. Van Sickle of November 3, 1983, he stated that he was going to issue an Order to Show Cause why Snyder should not be suspended "[F]or a period of one year."

It is, therefore, respectfully submitted that Chief Judge Lay should have recused himself from any consideration of this matter and that his failure to do so is sufficient basis for a rehearing in banc and the subsequent dismissal of the proceeding against Mr. Snyder.

Additionally, it is respectfully submitted that the Order of Suspension should be set aside because to order his

suspension because of the language in the letter to Helen Monteith would violate his First Amendment rights.

It is apparent from the decision that the suspension of Mr. Snyder is entered not on the grounds set forth in the Order to Show Cause, but because of the language contained in the October 6, 1983, letter to Helen Monteith. It is respectfully submitted that, since that is the basis of suspension, it is necessary to address the First Amendment Freedom of Speech rights that lawyers and all other persons are entitled to under the First Amendment to the Constitution. In the October 6, 1983, letter all Mr. Snyder did was complain to the federal district court secretary about problems he had encountered in his representation of indigents in the court, which letter was written at the secretary's suggestion. The letter simply vents frustration of a practicing attorney towards a system which has not been working particularly well.

Additionally, and more importantly, it is respectfully submitted that, under the First Amendment, Mr. Snyder had the right to say what he said in the October 6th letter without fear of reprisal. The cases dealing with the subject of First Amendment rights make clear that truthful criticism is protected by the First Amendment, subject to regulation only to the extent that it presents a clear and imminent threat to the fair administration of justice or involves conduct disruptive of a judicial proceeding. See *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 352 (1940); and *Polk v. State Bar of Texas*, 374 F. Supp. 784 (N.D. Tex. 1974).

Regarding the constitutional standard applicable to the regulation of a lawyers extra judicial criticism of the judiciary, the Supreme Court in *Bridges* explained that clear

and present danger "[I]s a working principle that the substance of evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." (314 U.S. at 263). (See also: In re: Hinds, 449 A.2d 483 (N.J. 1983)).

A private letter written to the local federal district court judge's secretary simply does not rise to the level that it can be said to be an imminent threat to the fair administration of justice or disruptive of a judicial proceeding.

Therefore, it is respectfully requested that on the grounds and for the reasons above stated it is appropriate that a rehearing be held in the captioned action in banc.

Dated this 20th day of April, 1984.

Respectfully submitted,

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McDonald & Johnson
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Bismarck, North Dakota 58502
By: /s/ David L. Peterson
David L. Peterson

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By: /s/ John C. Kapsner
John C. Kapsner

EXHIBIT "A"

AFFIDAVIT

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

I, Helen F. Monteith, being first duly sworn, state:

1. That Mr. Robert J. Snyder represented an indigent defendant before Judge Bruce M. Van Sickle in 1983, and experienced difficulty in the processing of his voucher.

2. Mr. Snyder called this office and told me of his difficulty. I suggested he write a letter to this office stating his concerns regarding the frustration of counsel in representing indigent defendants, and being compensated for it.

3. He sent a letter which I showed to Judge Van Sickle, and at the Judge's direction sent it on to the Circuit Court.

4. I have known Mr. Snyder for a number of years. He has always been willing to accept his share and more of the indigent defense cases in the Southwestern Division of the District of North Dakota, and I believe he did not intend to show disrespect for the federal court system.

Bismarck, North Dakota this 19th day of April, 1984.

/s/ Helen F. Monteith
Helen F. Monteith

Subscribed and sworn to before me this 19th day of April, 1984.

/s/ Jacquelin Beaudoin
Jacquelin Beaudoin, Notary Public
Burleigh County, North Dakota

My commission expires: 12/10/88
(Seal)

EXHIBIT "B"

AFFIDAVIT

I, Bruce M. Van Sickle, United States District Judge, District of North Dakota, state:

1. That Mr. Robert J. Snyder represented indigents before me on a number of occasions.

2. That in 1983 he was involved in representing an indigent defendant, and experienced problems in processing his voucher.

3. That Mr. Snyder sent my office a letter protesting his difficulties.

4. I discussed the letter with Mr. Snyder. My concern was the protest over the fee schedule, and his protest over the paper work required.

5. I did not view the letter as one of disrespect for the Court, but rather one of a somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process.

6. Mr. Snyder has appeared before me on a number of occasions and has always competently represented his client, and has shown the highest respect to the court system and to me.

Bismarck, North Dakota this 19th day of April, 1984.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

EXHIBIT "C"

RESOLUTION

WHEREAS, Robert Snyder has been a member of the Burleigh County Bar Association since he and his two partners opened their practice in Bismarck, North Dakota, in 1977, following graduation from law school; and

WHEREAS, since that time Robert Snyder has developed his practice and enjoys the respect of the entire membership of the Burleigh County Bar Association, and is recognized as a hard-working, well-qualified, ethical attorney, who is a credit to the legal profession in Burleigh County and the State of North Dakota; and

WHEREAS, during the same period of time Robert Snyder has involved himself in community activities which are a credit to him individually, and also reflect positively on the legal profession in this community; and

WHEREAS, Robert Snyder has been on a panel of attorneys who are called upon to defend indigents in Federal District Court in the Southwestern Division of the District of North Dakota, and that between January, 1980 and December, 1983, out of 99 indigent appointments, Robert Snyder has personally accepted 8 of the appointments, and his two partners have accepted an additional 7 indigent appointments, for a total of 15 indigent appointments, or more than 15% of the appointments in all indigent cases handled in the Southwestern Division during the three year period; and

WHEREAS, there are approximately 276 licensed non-corporate and non-government private practitioners prac-

ticing law in the Southwestern Division of the District of North Dakota; and

WHEREAS, the Criminal Justice Act plan for the district of North Dakota presently in effect as approved by the Eighth Circuit Court of Appeals provides that the panel shall include lawyers who ". . . are competent to give adequate representation to parties under the Act, and are willing to serve." And,

WHEREAS, the panel of attorneys for the Southwestern Division of the District of North Dakota currently on file under the Act only has 87 of the approximately 276 licensed practitioners included thereon, which makes it clear that only approximately 31% of those licensed practitioners eligible for appointment have indicated that they ". . . are willing to serve". And,

WHEREAS, the Burleigh County Bar Association has been advised that Robert Snyder has requested that his name be removed from the Criminal Justice Act panel of attorneys, and that as a result of that request, he has been ordered to show cause in the Eighth Circuit Court of Appeals why he should not be suspended from practice in the Federal District Court in North Dakota as well as in the United States Court of Appeals for the Eighth Circuit for such period of time as his refusal to serve continues; and

WHEREAS, in March, 1982, at a meeting of the Federal Practice Committee, the Federal District Court for North Dakota appointed a subcommittee to review the problems with the Criminal Justice Act appointment system within the District of North Dakota; and

WHEREAS, the Burleigh County Bar Association recognizes and believes that the current system places an

undue burden upon some practitioners and other practitioners are not called upon in any manner for service to the indigents; and

WHEREAS, the record reflects that Robert Snyder and his lawfirm have accepted appointment to represent 15% of the cases where counsel have been appointed for indigents in the Southwestern District of the District of North Dakota between January, 1980 and December, 1983, the Burleigh County Bar Association believes that Robert Snyder has fulfilled in a more than satisfactory manner his obligations as a member of the Bar; and

WHEREAS, at least 69% of the licensed practitioners in the Southwestern District of the District of North Dakota have chosen not to serve as counsel for the indigents by not having their names included on the panel of lawyers available for appointment as allowed under the current Criminal Justice Act plan, and no disciplinary action has been commenced against any of said lawyers.

NOW, THEREFORE, BE IT RESOLVED that the Burleigh County Bar Association urges that the Eighth Circuit Court of Appeals not issue an order suspending Robert Snyder from practice in the Federal District Court for North Dakota and the Eighth Circuit Court of Appeals, because the Burleigh County Bar Association believes that Robert Snyder is a credit to the legal profession, and that the record above outlined reflects that he has shouldered more than his fair share of the cases involving indigent criminal defendants, and the Burleigh County Bar Association believes that the Criminal Justice Act plan should be reviewed and revised, and that the roll of attorneys should be revised and updated so that the burden and responsibility of defending indigents can be more evenly distributed among all members of the Bar.

Said Resolution to be filed with the Eighth Circuit Court of Appeals on behalf of Robert Snyder.

Dated this 15th day of February, 1984.

Burleigh County Bar Association

By /s/ Jo Wheeler Johnson
Jo Wheeler Johnson, President

Attest:

/s/ William Severin
William Severin, Secretary

No. 84-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of Attorney Robert J. Snyder

MOTION AND BRIEF OF OHIO STATE BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

FRANK E. BAZLER, President
Ohio State Bar Association

ALBERT L. BELL
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Amicus Curiae
Member of Bar
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:
Attorney Robert J. Snyder

MOTION OF OHIO STATE BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

The Ohio State Bar Association hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the petitioner has been obtained. The consent of the respondent has been requested but has not been obtained. Respondent states that its consent is not required.

INTEREST OF AMICUS

The Ohio State Bar Association is a voluntary association whose membership is open to all members of the Bar of Ohio. The organization has more than 17,000 members and is directed and managed by a 21 member Executive Committee elected by the membership. This Motion and Brief was authorized by unanimous vote of the Executive Committee.

The interest of the Ohio State Bar Association in this case is predicated upon its commitment to the position that the public has a right to and a need for information on the judiciary. Lawyers have the full panoply of rights and freedoms of other citizens including, of course, the freedom of speech guaranteed by the First Amendment to the United States Constitution. Lawyers like other citizens are free to criticize the state of the law including rules of court, and no one should say that this sort of criticism is an improper attack upon the judiciary.[1] Citizens can only properly evaluate the effectiveness of the judiciary if there is no restriction on free speech of lawyers. The decision and order of the Court below will impact upon lawyers' rights of free speech far beyond the reaches of North Dakota.

ARGUMENT

The Court below has suspended petitioner from the practice of law in the federal courts of the United States Court of Appeals for the Eighth Circuit for a period of six months (or more) for remarks made by petitioner in a private letter to the Secretary of the United States District Court for the District of North Dakota. The basis of the suspension was that the remarks were disrespectful to the court. The remarks, in essence, complained of the small fees paid to a lawyer for indigent defense work and the added work to document entitlement to a fee. He concluded his letter by saying he would not send the court anything else, and the court could "take it or leave it." Of course, the court could have left it, but instead, for this remark (and his refusal to apologize), after hearing, petitioner was suspended from practice.

---

[1]There is now pending in our State proposed rules of Court that would severely limit, under pain of disciplinary action, a lawyer's right to speak to the electorate about the qualifications of candidates for judicial office.

Whether or not petitioner's conduct was of sufficient seriousness to be grounds for such drastic action (*see In re Sawyer,* 360 U.S. 622 (1959)), requires a consideration of the protection afforded by the First Amendment to the United States Constitution. It is indisputable that attorneys retain this constitutional protection even as participants in the judicial process. *In re Halkin,* 598 F.2d 176-187, *In re Primus* 436 U.S. 412, 431-32 (1978).

In a long line of cases this court has held that when government regulates activities in an area protected by the First Amendment, the regulations must be narrowly drafted to eliminate a specified evil and must not unnecessarily intrude on protected speech. See e.g. *In re R.M.J.* 455 U.S. 191 (1982); *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council* 425 U.S. 743, 769-70 (1976); *Bigelow* v. *Virginia,* 421 U.S. 809, 827-829 (1975).

These cases make it clear that a person's right to freedom of speech guaranteed by the Constitution of the United States is no less by reason of having a license and privilege to practice law. It is only in those instances where unbridled speech amounts to misconduct which threatens a significant state interest that government may restrict a lawyer's exercise of rights guaranteed by the Constitution. We do not suggest, nor do the cases hold, that an attorney's right of free speech is absolute. But resting disciplinary action upon "disrespectful language" in an out of court communication is too insubstantial a base to withstand judicial scrutiny. "Preventing a potential loss of respect by citizens for our legal institutions is not a sufficiently compelling governmental interest to justify restrictions on speech." *Bridges* v. *California* 314 U.S.252, at 270 (1940).

The lawyer's role as an officer of the court is to protect the fairness of proceedings. While attorneys also have some responsibility for insuring public confidence in the legal system, the system's public image cannot be protected at the

cost of shielding either judges or the law itself from criticism. *In re Hinds,* 449 A. 2d 483 (N.J.). As Justice Black stated in *Bridges* v. *California, supra,* "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and an enforced silence, however limited, solely in the name of preserving dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect." 314 U.S. at 270-71.

It is also quite possible that criticism of judges, or of the law, or of the administration of the law, may in fact be deserved. If this is so, and it clearly appears to be so in this case, then the criticism will serve to improve rather than prejudice the administration of justice. But of even greater importance in the constitutional context, there is no reason to believe critical statements about judges or the law, even when inaccurate, necessarily reduce the ability of our legal system to protect rights and do justice. *In re Hinds, supra,* at 501.

Attorneys are more knowledgeable than other citizens about the laws and how they are administered in our legal system. Attorneys often engage in disputes, and in doing so they can sometimes be assertive. There is room for disagreement on matters of taste and judgment, but not as to the fundamental right to speak as any other citizen. Preventing attorneys from communicating their views on the subjects they know best would go a long way toward isolating our legal system from public scrutiny. That is a result that a democracy should not tolerate.

CONCLUSION

The chilling effect of aggressive professional discipline by courts seeking to insulate themselves from criticism is a source of mounting concern to lawyers throughout the country. The interests of lawyers and judges will be best served if this Court addresses the important constitutional issues presented by this case.

If the Court does not grant review, it should at least vacate the judgment of the court below on either the ground that petitioner's right to due process of law was violated (*see, In re Ruffalo,* 390 U.S. 544 (1968)) or on the ground that the evidence was insufficient to support the order of suspension of petitioner from the practice of law. *In re Sawyer,* 360 U.S. 622 (1959).

Respectfully submitted,

Frank E. Bazler, President
Ohio State Bar Association

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No. 84-310

In the Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:

Attorney Robert J. Snyder.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

Robert J. Snyder is a party to this proceeding. By letter dated October 19, 1984, the Office of the Clerk of the Supreme Court of the United States informed the U.S. Court of Appeals for the Eighth Circuit that the Supreme Court had requested that a response be filed to Mr. Snyder's petition for writ of certiorari.

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BRIEF IN OPPOSITION

The United States Court of Appeals for the Eighth Circuit respectfully opposes the Petition for Writ of Certiorari to review the opinions and judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on April 13, 1984, and May 31, 1984.

OPINIONS BELOW

Both opinions of the United States Court of Appeals for the Eighth Circuit are reported at 734 F.2d 334 (8th Cir. 1984).

See also Petition for Writ of Certiorari therein, p. 1. (Rule 34.2, Rules of the Supreme Court)

JURISDICTION

See Petition for Writ of Certiorari therein, p. 2. (Rule 34.2, Rules of the Supreme Court)

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED

In addition to the First and Fifth Amendments to the United States Constitution cited by petitioner (see Petition for Writ of Certiorari therein, p. 2), the United States Court of Appeals for the Eighth Circuit believes the following statutes and regulations are involved.

1. 18 U.S.C. §3006A(d)(1-4) (1982). (App. RA, *infra*, pp. A1-2.)

2. *Guidelines for the Administration of the Criminal Justice Act*, ch. 2, §3 (2.22, 2.27), Vol. VII, Guide to Judiciary Policies and Procedures. (App. RB, *infra*, pp. A3-8.)

STATEMENT OF THE CASE

Pursuant to Rules 22 and 34.2 of the Rules of the Supreme Court, this Statement of the Case is submitted to correct material omissions and inaccuracies in the Statement set forth in the Petition for Writ of Certiorari. It is uncontroverted that petitioner's claim for compensation and reimbursement submitted to Chief Judge Lay pursuant to 18 U.S.C. §3006A(d) of the Criminal Justice Act did not comply with the applicable guidelines. After failing twice to comply with the guidelines, petitioner wrote a letter dated October 6, 1983, which was addressed to the secretary of the District Court.[1] (App. C, A25.) Petitioner wrote this letter in response to Chief Judge Lay's request that he comply with the guidelines. On November 15, 1983, Chief Judge Lay wrote Judge Van Sickle and indicated, *inter alia*, that if Mr. Snyder wishes to write the Court and offer his apology to the Court for his disrespectful comments he would be willing to recommend to the Court that the Order to Show Cause not be filed. (App. RD, *infra*, pp. A10-11.) On December 12, 1983, Judge Van Sickle informed Chief Judge Lay that Mr. Snyder had decided not to apologize. (App. RE, *infra*, p. A12.) Subsequently, on December 22, an Order to Show Cause was filed. (App. E.)

Petitioner prepared a Return to the Order to Show Cause which was filed on January 16, 1984. (App. RF, *infra*, pp. A13-20.) Petitioner does not note in his Statement of the Case that he had acknowledged in his Return that the present proceeding was initiated by the letter of October 6, 1983, and that had the letter not been sent, this proceeding would not be taking place.

The hearing on the Order to Show Cause was held on February 16, 1984. Petitioner was given an opportunity at the hearing to apologize for his October 6 letter. He refused to do so and added, "if I'm suspended, I can tell you that the situation in Bismarck will become worse than it already is, because, I don't think you're going to find anybody that will take a case." (App. RG, *infra*, p. A24.) On February 24, 1984, Chief Judge Lay wrote petitioner giving him yet another opportunity to apologize. (App. RI, *infra*, pp. A27-28.) Petitioner responded on February 27 and indicated that he would never apologize, invited the Court to do whatever it felt it had to do, and intimated that he would accept the consequences of whatever the Court's action would be. (App. RJ, *infra*, pp. A29-30.)

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1. Petitioner had previously refused to verify his telephone expenses and refused to send an *hourly* breakdown of his time expended in the case. See Petitioner's letter of September 20, 1983. (App. RC, *infra*, p. A9.)

SUMMARY OF ARGUMENT

Petitioner was disciplined for his disrespectful failure to comply with the relevant guidelines for the judicial administration of the Criminal Justice Act. The Order to Show Cause filed December 22, 1983 (App. E), and Chief Judge Lay's letter of November 3, 1983 (App. D), placed petitioner on notice that the Eighth Circuit Court of Appeals was concerned about his course of conduct. Petitioner acknowledges this fact in his petition (Pet. 4) and in his Return to the Order to Show Cause. (App. RF, *infra*, p. A15.) In any event, the adamant refusal of petitioner to apologize renders any remand for hearing pointless.

Petitioner's claim that his First Amendment rights were violated is without merit. Petitioner's harsh and disrespectful remarks are an unmitigated attack on the legal system and the power of the judiciary to implement and administer the law. Lawyers, as officers of the Court, should demonstrate public confidence in and respect for the law and the legal system. Law could not long survive if officers of the Court engaged in this conduct.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE PETITIONER WAS AFFORDED DUE PROCESS OF LAW

The disciplinary procedures of all Circuit Courts of Appeals are embodied in rule 46(c) of the Federal Rules of Appellate Procedure. Rule 46(c) provides that a court of appeals may discipline an attorney for certain conduct after reasonable notice, opportunity to show cause to the contrary, and hearing, if requested.[2]

Petitioner does not address the issue of whether rule 46(c), F.R.App.P., is unconstitutional, as his first question for review contemplates, but instead proceeds from a totally different premise. Plaintiff cannot seriously contend that rule 46(c) is unconstitutional. As this Court has intimated, if notice is given and is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to be heard, due process is achieved. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Rule 46(c) satisfies this constitutional dictate.

In contrast to the manner in which petitioner phrases his question for review, his argument is directed to

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2. The text of rule 46(c) is as follows:

Disciplinary Power of the Court over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

whether he in fact was afforded due process. Although this question is not technically presented for review, it also is without merit. The facts show that petitioner was afforded proper notice of the reasons for the proposed suspension and an opportunity to be heard on the specific charges. On November 3, 1983, Chief Judge Lay wrote Judge Van Sickle, with copy to the petitioner, concerning petitioner's letter of October 6 to the District Court's secretary. (App. D.) In that letter, Chief Judge Lay stated in pertinent part:

> *I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. That demonstrates a total lack of respect for the legal process and the courts.*
>
> * * *
>
> Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, *my concern now is related to the apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it.*
>
> * * *
>
> [*I*]*n view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one year.* This suspension of course will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made.

[Emphasis added.]

On December 22, 1983, the Court filed an Order to Show Cause. (App. E.) The Order indicates that Mr. Snyder has refused to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorneys' fees. The order further provides that in view of his refusal to *carry out his obligations as a practicing lawyer and as an officer of this Court,* he is ordered to show cause as to why he should not be suspended from practice in the Federal District Court, as well as in the United States Court of Appeals for the Eighth Circuit for such period of time as his refusal to serve continues. [Emphasis added.]

By virtue of the November 3, 1983, letter and the Order to Show Cause, petitioner clearly was put on notice that his letter of October 6 could form the basis for possible disciplinary action. How can petitioner, who expressed "extreme disgust" at his treatment by the Eighth Circuit and told the circuit to "take it or leave it," reasonably contend at this late date that he was surprised at the show cause hearing that the panel was concerned about his disrespectful comments in his October 6 letter? His "Return to Order to Show Cause" filed on January 16, 1984, confirms this beyond doubt. (App. RF, *infra,* p. A15.) Petitioner begins his "Argument" in that Return as follows: "The present proceeding was really initiated when the undersigned drafted and sent the letter of October 6, 1983. Had that letter not been sent, this proceeding would not be taking place." Petitioner's blatant and admittedly harsh remarks in that letter both questioned and criticized the Chief Judge's authority under the law to implement the provisions of the Criminal Justice Act. This was the very matter set forth in the Court's show cause order. Plaintiff concedes this fact on page four of the petition: "On December 22,

1983, the circuit court issued an [O]rder [T]o [S]how [C]ause why attorney Snyder should not be suspended from the practice of law in the federal courts for his refusal to offer service under the Criminal Justice Act *and to comply with the relevant guidelines.*" [Emphasis added.]

Petitioner's claim that he was deprived of due process by not being allowed to defend his conduct on First Amendment grounds simply ignores the basis of the Eighth Circuit's action. It is clear from the Order to Show Cause and the two opinions filed by the Eighth Circuit that petitioner was cited and disciplined for the disrespectful refusal to comply with the guidelines promulgated under the Criminal Justice Act. His refusal to comply, coupled with the language used, was an explicit statement of disrespect to the Federal Court. As such, Snyder impeded the orderly processing of attorneys' fee applications and the administration of justice.

Throughout his petition, petitioner has mischaracterized the basis of the Eighth Circuit's action against him. He claims that the October 6, 1983, letter was a private letter to a District Court Judge's secretary written at her suggestion about problems he had encountered in the representation of indigents (Pet. 12); that the letter was not within the court system (Pet. 13); and that the letter was a commentary upon the Criminal Justice Act and its perceived failings. (Pet. 13.) None of these characterizations is accurate. Petitioner's letter of October 6 came as a direct response to the Eighth Circuit's request that Snyder furnish more documentation and comply with the requirements of the Criminal Justice Act. Moreover, petitioner does not criticize the prudence of congressional legislation, but in quite disrespectful terms, impugns and questions the Chief Judge's authority and responsibility for administering the Criminal Justice Act.

It is undisputed that petitioner did not comply with the requirements of the Act on documenting his fees and expenses. Petitioner's response to the Eighth Circuit was: "You can take it or leave it." This simply is not a case where a citizen might express disrespectful defiance of the law, *cf. Cohen v. California,* 403 U.S. 15 (1968) but, rather, is a case where an officer of the Court has disrespectfully refused to comply with a congressional mandate and follow the law.

Further, the record shows that on four occasions the Eighth Circuit gave petitioner an opportunity to express his regret for his hasty conduct before acting to suspend him: 1) in Chief Judge Lay's letter of November 15, 1983 (App. RD, *infra,* pp. A10-11); 2) during the course of the show cause hearing (App. RG, *infra,* pp. A22-23); 3) at the close of the show cause hearing (App. RG, *infra,* p. A24); and 4) in Chief Judge Lay's letter of February 24, 1984. (App. RI, *infra,* pp. A27-28.) Petitioner elected not to do so. At no time did petitioner raise a procedural due process issue; request a further hearing on his purported First Amendment rights; or request that he be given time to retain counsel. He was and remains steadfast in his position that he is going to do nothing about his disrespectful refusal to comply with the guidelines promulgated under the Criminal Justice Act. Petitioner writes in his February 27 letter: "I cannot and will *never,* in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms." (App. RJ, *infra,* p. A29.) [Emphasis added.] In view of petitioner's own position, his claims of procedural due process ring hollow. No material facts are at issue with respect to Mr. Snyder's conduct. In this particular setting, it would be an empty gesture to remand on due process grounds. *United States v. Lawson,* 600 F.2d 215, 218 (9th Cir. 1979).

The Eighth Circuit panel issued its opinion on April 13, 1984, suspending petitioner for six months. (App. A.) Petitioner requested the circuit to rehear the matter en banc. (App. F.) Thus, he was presented with another opportunity to present, in written form, any and all reasons relative to the purported justification for his conduct and to raise any legal issues he deemed pertinent. The circuit, although denying the petition for rehearing en banc, discussed petitioner's claim on the merits and, by a vote of seven to two, ruled against him. (App. B.) The circuit however, was willing to stay the panel's order for ten days pending further action from petitioner. Such response was not forthcoming and, it appears, will *never* be forthcoming.

Petitioner further argues that the Chief Judge of the Court of Appeals should have recused himself in a consideration of this matter because of the provisions of 28 U.S.C. §455 (Pet. 10), which state in pertinent part:

> Disqualification of justice, judge, or magistrate:
>
> (b) [A judge . . .] shall . . . disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed and evidentiary facts concerning the proceeding. . .

The petitioner argues only that the Chief Judge had personal knowledge of the facts concerning the proceedings. (Pet. 11.) The mere fact that a judge gains prior knowledge of facts concerning the matter before him is not, in and of itself, sufficient to require the judge to disqualify himself. *See United States v. Coven*, 662 F.2d 162, 168 (2nd Cir. 1981), *cert. denied*, 456 U.S. 916 (1982); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). Furthermore, facts learned by a judge while acting in his judicial capacity can never be the basis for disqualification under 28 U.S.C. §455. *United States v. Patrick*, 542 F.2d at 390.

It is clear that under the statute, the personal knowledge of facts that disqualifies the judge must arise out of extrajudicial observation or misconduct. It is also clear from an examination of the allegations and argument of the petitioner that the Chief Judge's personal knowledge of facts, just like the other Circuit Judges' knowledge of the facts, was gained solely as judge in the matter before him.

II. PETITIONER'S RIGHT TO FREE SPEECH IS NOT INVOLVED

The second question is whether the disciplinary procedures of the Court of Appeals can constitutionally abrogate the First Amendment rights of attorney Robert J. Snyder. (Pet. I.) Once again, this question was not briefed by petitioner. This question appears to contemplate that rule 46(c) of the Federal Rules of Appellate Procedure is, on its face, constitutionally violative of petitioner's First Amendment rights. To state the proposition is to demonstrate its absurdity. Rule 46(c) is procedural; it does not attempt to regulate conduct or, in this instance, to regulate the content of speech. This second issue, as phrased, is simply devoid of merit.

What petitioner does argue in the body of his petition is that his First Amendment rights have been violated by the imposition of a six-month suspension. He states that in cases dealing with the subject of First Amendment rights, truthful criticism is subject to regulation only to

the extent that it presents a clear and imminent threat to the fair administration of justice or involves conduct disruptive of the judicial proceeding. For this proposition he cites three United States Supreme Court cases: *Craig v. Harney,* 331 U.S. 367 (1947); *Pennekamp v. Florida,* 328 U.S. 331 (1946); and *Bridges v. California,* 314 U.S. 252, 263 (1940). All three of these cases are inapposite. They involve the power of a court to punish a newspaper or a member of the press for contempt for out-of-court statements. They do not pertain to the power of a court to discipline attorneys who are officers of the Court.[3]

A majority of this Court has intimated that the clear and present danger test is not applicable to a court's inherent power to discipline officers of the court for contumacious conduct. *See In re Sawyer,* 360 U.S. 622 (1959). Federal Rule of Appellate Procedure 46(c) grants the authority to discipline an attorney for "conduct unbecoming a member of the Bar." Moreover, as a member of the North Dakota bar and as a licensed attorney in the Eighth Circuit, Snyder is bound by the ethical canons of the legal profession. The ABA Code of Professional Responsibility in force and effect in North Dakota provides in Disciplinary Rule (DR)1-102(A)(5) that a lawyer shall not engage in conduct that is prejudicial to the administration of jus-

3. *United States v. Grace,* 103 S.Ct. 1702 (1983) is likewise not on point. The *Grace* case involved a constitutional challenge to a federal statute prohibiting the display of any flag, banner or device designed or adopted to bring into public notice any party, organization, or movement in the United States Supreme Court building or on the grounds of the Supreme Court, which are defined to include public sidewalks. The Court held that the statute could not be applied to prohibit expressive activity on the sidewalks surrounding the Court grounds. *Id.* at 1708. The instant case does not involve a statute which is overbroad in application. Nor does this case, as petitioner would have this Court believe (Pet. 13), involve speech which is not directed to the Court. Petitioner's statements were a direct attack on the judiciary and its competence and authority to interpret and carry out an act of Congress.

tice. Further, Ethical Consideration (EC)9-6 from said Code outlines the attorney's duty to maintain proper respect for the Court as an institution.

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

It is one thing for a lawyer to complain factually to the court; it is another as petitioner did in this instance, to be disrespectful in doing so. *Paul v. Pleasants,* 553 F.2d 97 (4th Cir. 1977).[4] The majority of this Court in the case of *In re Sawyer,* 360 U.S. 622 (1959) agreed that a lawyer cannot invoke the constitutional right of free speech to immunize himself from even-handed discipline for unethical conduct. As Justice Stewart observed in that case:

> A lawyer belongs to a profession with inherited standards of propriety and honor which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. *Obedience to ethi-*

4. Petitioner's claim that his criticism of the "puny" fees lawyers receive under the Criminal Justice Act is the basis of his suspension is not supported by the record. The two opinions of the Court of Appeals belie this argument.

cal precepts may require abstention from what in other circumstances might be constitutionally protected speech.

360 U.S. at 646-47. [Emphasis added.]

The Eighth Circuit's suspension of petitioner furthered important and substantial government interests of instilling public confidence in and respect for the law and maintaining the legitimacy of the judicial process. The limitation on petitioner's First Amendment freedoms was no greater than was necessary for the protection of that government interest. *See Procunier v. Martinez,* 416 U.S. 396, 413 (1974). The focus of petitioner's argument is that he can impugn the integrity and majesty of the law with impunity, or as he phrases it "without fear of reprisal." This argument is unprecedented. As an officer of the Court, an attorney is duty bound to show respect for the law. How can the citizenry be expected to have public confidence in the legal system if one of the officers of the Court states in no uncertain terms that he will not follow or obey the law? Notwithstanding petitioner's characterization of his speech, this matter simply does not concern the mere criticism of the wisdom of certain legislation. Petitioner's comments strike at the very heart of the viability of the law. By flaunting his disrespect for the law, petitioner has impeded the administration of justice in the case in which he was serving as counsel. By his remarks at the hearing on the Order to Show Cause and his veiled threat to the circuit that no one in Bismarck would follow the dictates of the Criminal Justice Act guidelines if he were suspended, petitioner has clearly impeded the administration of justice generally.

CONCLUSION

It is respectfully submitted that the petitioner has attempted to distort the basis upon which the disciplinary action was taken. The suspension was directly related to his disrespectful refusal to comply with the law. His suspension has nothing to do with his criticism of the Criminal Justice Act or the schedule of fees that Congress has provided therein. It is the Court's belief that every lawyer should show respect to the Court and to the laws of the United States. This requirement is implicit in a lawyer's duties and as an officer of the Court. Plaintiff does not and cannot dispute that he refused to comply with the Criminal Justice Act guidelines. By stating that he was disgusted with the treatment of him by the Eighth Circuit, that the Court could "take it or leave it," and that he had "had it up to here," petitioner has directly impeded the administration of justice and displayed public disrespect to the Court itself. All the Court asked him to do was to comply with the guidelines promulgated under the Criminal Justice Act. It seems incredulous that a lawyer can ask the highest Court in the land to support his right to be disrespectful and to disobey the law.

Respectfully submitted,

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Dated this 18 day of December, 1984.

APPENDIX RA

18 U.S.C. §3006A(d)(1-4) (1982) provides:

(*d*) *Payment for representation*

(*1*) *Hourly rate.*—Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(*2*) *Maximum amounts.*—For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged, and $400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation pro-

ceeding or for representation provided under subsection (g) the compensation shall not exceed $250 for each attorney in each proceeding in each court.

(3) *Waiving maximum amounts.*—Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) *Filing claims.*—A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the District Court which shall fix the compensation and reimbursement to be paid.

APPENDIX RB

Pertinent Excerpts from *Guidelines for the Administration of the Criminal Justice Act,* Ch. 2 §3 (2.22, 2.27), Vol. VII, Guide to Judiciary Policies and Procedures

2.22 *Limitations.*

A. *Hourly Rates.* Counsel may be compensated at rates not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court. The hourly rates of compensation are designated and intended to be maximum rates and to be treated as such. In each district court, counsel claiming in excess of $750 shall attach to the CJA voucher a memorandum detailing the services provided. The memorandum shall be in both narrative and statistical form and provide justification for hours spent. Whenever warranted by the circumstances of the case, counsel claiming less than $750 in a district court, and counsel claiming any amount in a court of appeals, may be required by the presiding judicial officer to submit a memorandum supporting and justifying the compensation claimed.

B. *Maximum Compensation.*

1. *Preliminary Proceedings and Proceedings Before a United States District Court.* Compensation (exclusive of allowable expenses) is limited to $1,000 for each attorney in a case in which one or more felonies are charged, to $400 for each attorney in a case in which only misdemeanors are charged in preliminary proceedings and proceedings before a United States district court, and to $250 for each attorney in connection with a post-trial mo-

tion made after entry of judgment, or in a probation or parole revocation or parole termination proceeding, or for representation as provided under Subsection (g). If a case is disposed of at an offense level lower than the offense originally charged, the compensation maximum is determined by the higher offense level. In capital cases or in other difficult cases in which the court finds it necessary to appoint more than one attorney, the limitations apply to each attorney. Payments in excess of these limitations may be made to provide fair compensation in cases involving extended or complex representation when so certified by a United States district judge or magistrate, as applicable, and approved by the Chief Judge of the United States Court of Appeals. The finding of the court that the appointment of an additional attorney in a difficult case was necessary and in the interest of justice shall appear on the Order of Appointment.

Counsel claiming payment in excess of the statutory maximum shall submit with his voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation. Upon preliminary approval of such claim by the district court, the court should furnish to the chief judge of the circuit a memorandum containing his recommendations and a detailed statement of reasons.

In determining if an excess payment is warranted, the district court judge and the chief judge of the Circuit should make a threshold determination as to whether the case is either extended or complex. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex". If more time is reasonably required for total pro-

cessing than the average case, including pre-trial and post-trial hearings, the case is "extended."

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard: responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed; knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and injury thereto; any extraordinary pressure of time or other factors under which services were rendered; and any other circumstances relevant and material to a determination of a fair and reasonable fee.

2. *Proceedings in Courts of Appeals.* The $1,000 limitation applies to the compensation payable for each attorney in an appellate court, including the district court on appeals from a magistrate's judgment. Appeals of post-trial motions, revocations of probation or parole, or other representation under Subsection (g) of the Act are subject to the $250 limitation for each attorney as provided in the last sentence of Subsection (d) (2) of the Act. Payment in excess of these limitations may be made to provide fair compensation in cases involving extended or complex representation when so certified by the court and approved by the Chief Judge of the Circuit.

C. *Reduction of CJA Compensation Vouchers by the Reviewing Judicial Officer.* The Criminal Justice Act provides that the reviewing judicial officer shall fix the compensation and reimbursement to be paid to appointed counsel. In cases where the amount approved is less than was requested by appointed counsel, the judicial officer may wish to notify appointed counsel that his or her claim

for compensation and/or reimbursement has been reduced, and to provide an explanation for the reasons for the reduction.

D. *Payments by a Defendant Under Subsection (f) of the Act.* No appointed attorney shall accept a payment from or on behalf of the person represented without authorization by a United States district or circuit judge or magistrate on CJA Form 7. If such payment is authorized, it shall be deducted from the fee to be approved by the court under Subsection (d) of the Act. In this regard, the combined payment to any one attorney for compensation from both the person represented and the Government shall be subject to applicable dollar limitations, unless excess compensation is approved under Subsection (d) (3) of the Act. Whenever the court finds that funds are available for payment from or on behalf of a person represented and directs that such funds be paid to the court for deposit in the Treasury, a check or money order drawn to the order of the Administrative Office of the United States Courts should be transmitted by the clerk of court to the Administrative Office together with completed CJA Form 7. The collections which are for deposit to the credit of the CJA appropriation will be processed by and included in the account of the Disbursing Officer of the Administrative Office. Subsection (f) of the Act does not authorize a judicial officer to require reimbursement as a condition of probation.

E. *Services Before United States Magistrates.* Magistrates may only approve vouchers for services rendered in connection with a case disposed of entirely before the magistrate.

2.27 *Reimbursable Out-of-Pocket Expenses.* Out-of-pocket expenses reasonably incurred may be claimed on the voucher, and must be itemized and reasonably documented. Expenses for investigations or other services under Subsection (e) of the Act shall not be considered out-of-pocket expenses.

A. *Reimbursement for Transcripts.* The cost of court authorized transcripts may be claimed as a reimbursable expense, as provided for in Subsection (d) (1) of the Criminal Justice Act (but see paragraph 3.12 of these Guidelines). Claims for reimbursement for payments for transcripts authorized by the court should be submitted on CJA Form 24. (See Appendix A) The cost of transcribing depositions in criminal cases is the responsibility of the Department of Justice pursuant to Rule 17b of Fed. R. Crim. P. (but when witness is an expert, then the Administrative Office will pay out of CJA funds) (39 Comp. Gen. 133 (1959)).

B. *Travel Expenses.* Travel by privately owned automobile should be claimed at the rate currently prescribed for Federal judiciary employees who use a private automobile for conduct of official business, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis.

Per diem in lieu of subsistence is not allowable, since the Act provides for reimbursement of expenses actually incurred. Therefore, counsel's expenses for meals and lodging incurred in the representation of the defendant would constitute reimbursable "out-of-pocket" expenses. In determining whether actual expenses incurred are "reasonable," counsel should be guided by the prevailing limitations placed upon travel and subsistence expenses of Federal judiciary employees in accordance with existing government travel regulations.

C. *Interim Reimbursement for Expenses.* Where it is considered necessary and appropriate in a specific case, the presiding judge or magistrate may, in consultation with the Administrative Office, arrange for interim reimbursement to counsel of extraordinary and substantial expenses incurred in providing representation in a case.

D. *Other.* This would include items such as telephone toll calls, telegrams, copying (except printing - see paragraph 2.28 D below) and photographs.

APPENDIX RC

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Attorneys at Law
219½ East Broadway
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Gregory L. Bickle
James J. Coles
Robert J. Snyder

Telephone
(701) 258-1611

September 20, 1983

Helen Monteith
Clerk of Federal Court
Federal Building
3rd Street & Rosser Avenue
Bismarck, ND 58501

Re: Dennis Warren

Dear Ms. Monteith:

Enclosed with this letter you will find a copy of our billing records with regard to the above-entitled individual. These are all of the records which we have in our possession.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED
/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

RJS/jft
enclosures

Helen – these are the charges for Warren but the amounts aren't exactly right due to our computer's lack of the right money codes ($20 $30/hr)
RJ

APPENDIX RD

UNITED STATES COURT OF APPEALS
Eighth Circuit

Donald P. Lay
Chief Judge
P. O. Box 30908
St. Paul, Minnesota 55175

November 15, 1983

The Hon. Bruce M. Van Sickle
United States District Judge
P. O. Box 670
Bismarck, North Dakota 58501

Re: Mr. Robert Snyder (C1-83-4-01. U.S.A. v. Dennis Warren).

Dear Judge Van Sickle:

Thank you for your letter of November 9 relative to the above CJA matter. I appreciate your comments.

At this point, I feel that if Mr. Snyder wishes to write the court offering his apology to the court for his disrespectful comments, and assuring the court that he will in the future be willing to comply with the requirements of the CJA and the guidelines, I will then be willing to recommend to the court that the order to show cause not be filed and, as a result, become public record.

Should Mr. Snyder not choose to honor this request, it will then become necessary for me to have the show cause

order issued. I would appreciate your contacting Mr. Snyder in this regard.

Best regards.

Sincerely,
/s/ Donald P. Lay
Donald P. Lay

/j

P.S. I am enclosing herewith the CJA20. I have approved a fee of $1,000, and expenses for copies of $23.25. I have deleted the sum of $43.60 for long distance calls because of Mr. Snyder's failure to comply with the request to identify the calls. DPL

APPENDIX RE

UNITED STATES DISTRICT COURT
District of North Dakota
P. O. Box 670
Bismarck, North Dakota 58501

Bruce M. Van Sickle
Judge

December 12, 1983

The Honorable Donald P. Lay
Chief Judge
United States Court of Appeals
for the Eighth Circuit
Box 30908
St. Paul, Minnesota 55175

Dear Judge Lay:

I have had the problem of Mr. Robert Snyder in my mind, of course, ever since your first letter, and I have held off responding because Mr. Snyder had a juvenile matter to which he had already been appointed when this problem arose.

I have had two conversations with Mr. Snyder. He sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. I, of course, see it as a youthful and exuberant expression of annoyance which has now risen to the level of a cause. The second conversation was late Friday after the dispositional hearing on the juvenile. And I believe Mrs. Monteith talked to him today.

He has decided not to apologize, although he assured me he did not intend the letter as you interpreted it.

Yours truly,

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle

APPENDIX RF

(Filed January 16, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Re: Robert J. Snyder

RETURN TO ORDER TO SHOW CAUSE

FACTS

The following is a history of the development of the present proceeding:

On March 14, 1983, the undersigned was appointed by the Federal District Court for the District of North Dakota, Southwestern Division, to represent, on an indigent basis, Dennis Warren, who was charged with approximately six counts relating to cocaine trafficking. The normal pre-trial work was performed, and a jury trial was held in Federal District Court, lasting one full week, May 2-6, 1983. Mr. Warren was convicted on all counts.

On August 9, 1983, the undersigned filled out and sent to the Clerk of the Federal District Court the standard federal claim for services and expenses. The total amount of the claim was $1,898.55. A copy of the claim voucher and cover letter are attached hereto.

On August 17, 1983, Judge Van Sickle reduced the claim by $102.50, approved it, and forwarded the claim to the Eighth Circuit. A copy of Judge Van Sickle's cover letter is attached hereto.

On September 6, 1983, the administrative personnel of the Eighth Circuit returned the claim voucher, requesting itemized support for the claim. A copy of that letter is attached hereto.

On September 20, 1983, the undersigned forwarded to Federal District Court in Bismarck a complete set of his firm's itemized computer sheets for all work performed on the Warren case. A copy of the computer sheets and the cover letter are attached hereto.

On September 26, 1983, the undersigned received from the administrative personnel of the Eighth Circuit another letter rejecting the claim voucher and itemized information, stating that the information was insufficient due to the fact that the computer sheets billed in dollars instead of hours, and, also, because phone records for the requested phone expenses were not attached.

On October 6, 1983, the undersigned sent an admittedly strident letter, responding to the letter of September 26, 1983. A copy of that letter is attached hereto.

On November 3, 1983, the undersigned received from Chief Justice Lay a letter taking offense to the undersigned's letter of October 6, 1983. A copy of that letter is attached hereto.

Subsequent to November 7, 1983, the undersigned was shown a letter from Chief Justice Lay to Judge Van Sickle, in which it was stated that the entire matter would be dropped if the undersigned apologized for the [sic] his letter of October 6, 1983. No response was made by the undersigned.

On December 20, 1983, Chief Justice Lay caused to be issued an Order to Show Cause, which forms the basis of the present proceeding. A copy of the Order to Show Cause is attached hereto.

The undersigned now makes and files a Return to the Order to Show Cause, showing why he should not be suspended from practice before the United States Court of Appeals for the Eighth Circuit, and the courts thereunder.

ARGUMENT

The present proceeding was really initiated when the undersigned drafted and sent the letter of October 6, 1983. Had that letter not been sent, this proceeding would not be taking place. The letter was admitedly harsh in tone, but reflected the frustration of the undersigned with the indigent criminal appointment process as employed by the Federal Courts. This frustration stems from a number of sources.

First, the rates paid by the Federal Courts for indigent appointment, despite allegations to the contrary, do not cover the overhead of the attorney so appointed. This is one of the main reasons why so few attorneys can be found in this area to accept the federal appointments, as will be discussed below.

Second, apart from the actual rates themselves, the procedures which must be followed to collect the indigent appointment fees are oppressive.

In this case, the undersigned made a good faith effort to provide all justification in his possession for the fees and expenses charged. The computer sheets, attached hereto, which were forwarded to the Eighth Circuit in response to the request, are extremely detailed, and contain virtually every item of work and expense performed on the case. They were, quite simply, everything we had in our possession to justify the fee, yet they were rejected.

In addition, the undersigned was required to produce him firm's phone records to justify $43.00 in phone call expenses. In the first place, to go back over several months' phone records for this firm and find the calls in question would be prohibitively time-consuming, more time than would justify providing documentation for a $43.00 expense.

Even more importantly, however, this firm considers its telephone records to be privileged information, and it does not allow the records to be indiscriminately sent out of the office.

In response to the letter of the undersigned of October 6, 1983, the undersigned received the letter from Chief Justice Lay, dated November 3, 1983. The undersigned was, quite honestly, shocked by both its content and unveiled threat. It is interesting to note that the letter of Chief Justice Lay does not overly concern itself with the request of the undersigned to be removed from the panel of the indigent defense counsel. In fact, in the letter the Chief Justice specifically approves the request.

Instead, the letter entirely directs itself to what apparently is perceived as something in the vein of contempt on the part of the undersigned in his letter of October 6 1983.

The undersigned wishes to state that he has nothing but the greatest respect for both the Federal Courts and the Federal Judiciary. However, the letter of October 6, does correctly state the deep feelings of the undersigned towards a process which is unfairly applied to a limited number of attorneys.

It is also interesting to note that had the undersigned simply apologized for the letter of October 6, 1983, apparently without withdrawing his request for removal from the panel of indigent defense attorneys, the present proceeding would not be taking place.

On December 20, 1983, Chief Justice Lay issued the Order to Show Cause, a copy of which is attached hereto, and to which this document is a response. Again the undersigned was shocked, because the ground for the Order

to Show Cause was the undersigned's request for removal from the panel of indigent defense attorneys, something the undersigned, in reviewing the letter of Chief Justice Lay, did not consider to be a matter of offense. However, since specific grounds are being used for the Order to Show Cause, a reply is necessary.

The defense of Dennis Warren was not the first case that the undersigned has undertaken on an indigent basis in Federal District Court in Bismarck.

The records of the Clerk of the Federal District Court in Bismarck show that in the four-year period from January 1, 1980, through December 31, 1983, there were 99 indigent federal appointments for the District of North Dakota, Southwestern Division. Of those 99 appointments, the undersigned received eight, and the other two members of his firm received an additional seven.

Of the eight cases received by the undersigned, three were tried to juries. For the eight cases, the undersigned spent a total of 100.75 hours in court, and 115.53 hours out of court.

The panel of indigent defense counsel for the District of North Dakota, Southwestern Division, a copy of which is attached hereto, contains 88 names. If a strictly rotational appointment system were used for this panel, in the four-year period mentioned above the undersigned should have received 1.12 cases, instead of eight.

However, the panel itself is glaringly deficient in a number of ways. First, the panel was last revised in August, 1980. Among the names on the panel are Burton L. Riskedahl, who has been Burleigh County Judge for a number of years; Maurice R. Hunke, who has been a State District Judge for a number of years; Rick D. Johnson, who has been Solicitor General of the State of North Dakota

for a number of years; Robert O. Wefald, who was elected Attorney General of the State of North Dakota in 1980; and John A. Zuger, Sr., who is deceased. One can imagine the number of attorneys who have established practice in Bismarck since August of 1980, who are eligible for the panel but not on it.

As significant as the names which appear upon the panel, are the names which do not appear upon it. The panel does not contain a large number of attorneys, some of them among the most prominent in the Bismarck-Mandan area. The reason for their absence is easily found.

Attached hereto is a copy of the "Plan Pursuant to the Criminal Justice Act of 1964, as amended, for the United States District Court, District of North Dakota." If one turns to page 2 of the plan, *II. Sources of Names,* one finds the procedure by which attorneys appear on the panel of indigent defense counsel. The pertinent portion reads as follows:

> The State Bar Association of North Dakota, acting by and through its appropriate committee, has recommended a list of attorneys who, in the opinion of such Bar Association, are competent to give adequate representation to parties under the Act, and who are willing to serve.

The critical passages above are "competent to give adequate representation" and "willing to serve." If an attorney does not deem himself competent to act as counsel in a criminal case, his name does not appear on the panel. Further, if an attorney is not willing to serve as indigent defense counsel, his name does not appear on the panel. Given the rates allowable for indigent defense representation, it is readily apparent why a large number of attorneys are simply unwilling to serve.

If one strictly follows the guidelines as set forth in the above-described plan, the undersigned is doing nothing more than express his unwillingness to serve, as have a number of other attorneys. How, then, can the undersigned be singled out for suspension from practicing before the Eighth Circuit and the courts thereunder?

The undersigned has read *Williamson v. Vardeman,* 674 F.2d 1211 (8th Cir. 1982), which is cited in the Order to Show Cause, and has no great argument with the case itself. However, it should be noted that *Williamson* imposes a burden and obligation not only upon individual attorneys, but upon the *legal profession* itself to provide counsel to indigent defendants without adequate compensation.

If *Williamson* is to be applied, it should be applied equally to all practitioners of the legal profession, and not to an extremely small segment thereof who are both "competent" and "willing to serve" as indigent defense counsel in federal cases. In practice, the obligation and burden of representing indigents for less than adequate compensation falls upon a very small number of criminal defense attorneys, among them the undersigned, and excludes the large majority of practicing attorneys. Such a system is not just if that small minority, including the undersigned, is compelled to accept federal appointments, and subsidize its brethren who will not or cannot do so.

If the undersigned is to be compelled to continue to represent indigent clients in federal cases, then the compulsion must extend to all attorneys who practice within the Southwestern Division of the District of North Dakota, regardless of their willingness or competence to serve. The plan referred to above must be revised, all nongovernmental attorneys placed thereon, and the panel be appointed on a strictly rotating basis.

To compel the undersigned to serve, without extending the compulsion generally, and to sanction the undersigned with suspension if he refuses, without sanctioning generally, is a taking of the undersigned's private property for public use without just compensation and a denial of due process of law, in violation of the Fifth Amendment to the United States Constitution.

Pursuant to Rule 46 of the Federal Rules of Appellate Procedure, the undersigned requests a hearing on this return before the full Court.

Dated this 12th day of January, 1984.

Respectfully submitted,

BICKLE, COLES AND SNYDER,
CHARTERED
219-1/2 East Broadway
P.O. Box 2071
Bismarck, North Dakota 58502-2071
/s/ Robert J. Snyder
By: Robert J. Snyder

APPENDIX RG

(Excerpts from)
Transcript of Proceedings

No. 84-8117 *In Re Attorney Robert J. Snyder*

CHIEF JUDGE LAY: Docket No. 84-8117 *In Re Attorney Robert J. Snyder*. I take it Mr. Snyder is in the courtroom?

MR. SNYDER: I am Robert Snyder your honor.

JUDGE LAY: Are you appearing pro se, or do you have someone representing you?

MR. SNYDER: I am appearing pro se, however, I have with me Mr. David Peterson who appears not as my counsel, but as a representative of the Burleigh County Bar Association, and he wishes the opportunity to address the courts as well.

JUDGE LAY: Well, we will determine whether that will be allowed. Do you wish to make a statement to the court?

MR. SNYDER: May it please the court, I believe that my position on this matter has been adequately stated in my return. I guess, just by way of emphasis, the specific grounds for the order to show cause on this suspension is my request to be removed from the panel of attorneys who will accept indigent appointments for the Southwestern Division of the District of North Dakota. In my return I attached a copy of the plan for the District of North Dakota, and in that plan the panel of attorneys is comprised of attorneys who are both competent and willing to serve. While I have, in my opinion, done nothing more than declare my unwillingness to appear on the panel any more. And I don't believe that I have done anything

untoward and I am in fact following the guidelines of the plan.

JUDGE LAY: You are following which guidelines?

* * *

[10] but, isn't it reasonable to ask you to say to what city the call was placed?

MR. SNYDER: Well, your honor, those—I wouldn't even have any independent recollection of that, because that's the way our computer keeps the time.

JUDGE ARNOLD: You don't keep files showing these on your paying clients?

MR. SNYDER: We bill our paying clients the same way.

JUDGE ARNOLD: They don't ask you: "Well, who did you call on April 20?"

MR. SNYDER: No.

JUDGE ARNOLD: All right. Well, let me go back to the other question I had, which is the letter of October 6. And, I guess, the letter seems somewhat troubled. (INAUDIBLE)

MR SNYDER: Possibly.

JUDGE ARNOLD: I am asking you, sir, if you are prepared to apologize to the court for the tone of your letter?

MR. SNYDER: That is not the basis that I am being brought forth before the court today. Is not an apology. And I could have apologized when an apology was demanded from Judge Lay, and I declined—

JUDGE LAY: Was requested.

MR. SNYDER: Was requested. Well, it was apologize or I will bring an order to show cause why you should not be suspended, so I guess I don't know if that's much of a request. But, I didn't apologize then, and I'm not apologizing [11] now, and, by the way, that letter was

not sent to the Eighth Circuit, it was sent to Helen Monteith.

JUDGE ARNOLD: All right. I just want to get this clear, that you are declining to apologize for the letter of October 6.

MR. SNYDER: I am.

JUDGE ARNOLD: All right, sir.

MR. SNYDER: But that's also not the basis of this proceeding. The basis—

JUDGE ARNOLD: It's the basis of another proceeding. Because you have a duty as a lawyer to behave yourself in a respectful fashion, just as the courts have a duty to try to understand the problems of bar and to behave with courtesy towards members of the bar. And I have to say, that I think you are failing in your duty.

MR. SNYDER: Will the court have any other questions?

JUDGE HEANEY: I have one question. And I would join in what Judge Arnold has to say, and would add that you appear to be to me a young man with spirit, and intelligence, and competence, and I believe if you could combine that with some humility and some concern for your obligations as a lawyer, you could be successful, but if you aren't, then, you probably won't wind up being a credit to your profession. Having said that, you raised an issue which probably doesn't concern this proceeding, but that is of interest to me, and that is, when it was determined that the defendant had money and had resources, did you go to Judge Van Sickle and

* * *

[15] MR. SNYDER: Your honor, I have talked to a lot of people about this present proceeding, and quite honestly, the reaction in Bismarck is that everyone is aghast at it. You've seen some of the correspondence that

I have submitted: the resolution by the Burleigh County Bar; the Affidavit from Judge Glaser; the letter from the State Bar Association. I solicited none of that. That was done on their own behest. And, if I'm suspended, I can tell you that the situation in Bismarck will become worse than it already is, because, I don't think you're going to find anybody that will take a case.

JUDGE LAY: Well then, maybe they all will be suspended from practice.

MR. SNYDER: Maybe.

JUDGE LAY: Well, I would—I think just administratively, I'll give you ten days, Mr. Snyder, if you wish to write a letter to the court and purge yourself of the concern of the court—all it is is a simple statement that you will take pro bono assignments of the federal courts and that you will comply with the guidelines if you are asked to do so. If you choose not to do that, then simply notify the court and then we'll take it upon ourselves to so act. I suggest that you counsel with someone before you write your letter in defiant or disrespectful terms.

MR. SNYDER: Your honor, as far as I would again emphasize that, according to the plan for the District of North Dakota, if I am not willing to serve, I need not serve, [16] and I need not give any reason according to that plan either.

JUDGE LAY: That isn't the plan of the Eighth Circuit.

MR. SNYDER: It is the plan of the District of North Dakota, the court in which I am appointed on these cases.

JUDGE ARNOLD: Let me say one other thing, Mr. Snyder, and that is, when you are thinking about whether to write any further letter, I would like you to consider also whether you might change your position with respect to the letter of October 6.

APPENDIX RH

(Received February 23, 1984)

BICKLE, COLES AND SNYDER, CHARTERED
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The Little Building
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Gregory L. Bickle
James J. Coles
Robert J. Snyder

Telephone
(701) 258-1611

February 22, 1984

Clerk
United States Court of Appeals
For the Eighth Circuit
525 Federal Courts Building
316 North Robert Street
St. Paul, MN 55101

Re: Robert J. Snyder-Misc. 84-8017

Dear Sir:

In response to the oral demands made by the Court to the undersigned at the hearing on the Order to Show Cause, held in St. Paul on February 16, 1984, the undersigned responds as follows:

If and when a new Plan for the implementation of the Criminal Justice Act in the State of North Dakota is enacted, the undersigned will enthusiastically obey its mandates, just as he has obeyed the mandates, or lack thereof, in the existing Plan.

Further, the undersigned states that he will make every good faith effort possible to comply with the Court's guidelines regarding the payment of attorney's fees and expenses.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED
/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

RJS/cjm

cc: Judge Van Sickle
Judge Benson
Dewey Kautzmann

APPENDIX RI

UNITED STATES COURT OF APPEALS
Eighth Circuit

Donald P. Lay
Chief Judge
P. O. Box 30908
St. Paul, Minnesota 55175

February 24, 1984

Mr. Robert J. Snyder
Bickle, Coles and Snyder
Attorneys at Law
P. O. Box 2071
Bismarck, North Dakota 58502-2071

Re: Order to Show Cause. Misc. No. 84-8017.

Dear Mr. Snyder:

The clerk has forwarded to me a copy of your letter you have written to the court indicating that you will continue to offer your services for pro bono representation under the Criminal Justice Plan.

The court expressed its opinion at the time of the oral hearing that interrelated with our concern and the issuance of the order to show cause was the disrespect that you displayed to the court by way of your letter addressed to Helen Montieth, Judge Van Sickle's secretary, of October 6, 1983. The court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. You serve as an officer of the court and, as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution.

Before circulating your letter of February 23, I would appreciate your response to Judge Arnold's specific request, and the court's request, for you to apologize for the letter that you wrote.

Please let me hear from you by return mail. I am confident that if such a letter is forthcoming that the court will dissolve the order.

Sincerely,

/s/ Donald P. Lay
Donald P. Lay

cc: Chief Judge Benson
Judge Van Sickle
Mr. Maland, Clerk's Office

APPENDIX RJ

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The Little Building
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Bismarck, North Dakota 58502-2071

Gregory L. Bickle
James J. Coles
Robert J. Snyder

Telephone
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February 27, 1984

Chief Justice Donald P. Lay
c/o Office of the Clerk
United States Court of Appeals
For the Eighth Circuit
525 Federal Courts Building
316 North Robert Street
St. Paul, MN 55101

Re: Robert J. Snyder-Misc. #84-8017

Dear Chief Justice Lay:

I am in receipt of your letter dated February 24, 1984. Please be advised that my letter of February 22, 1984, entirely states my position concerning this matter.

I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. You must therefore search your conscience and determine what course of action will be serve the interests of justice and the administration of the Eighth Circuit.

It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on a principle, one must be willing to accept the consequences.

Thank you for your time and attention.

Very truly yours,

Bickle, Coles and Snyder, Chartered
/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

RJC/cjm

cc: Paul Benson
Bruce Van Sickle
Dwight C. H. Kautzmann

(4)

No. 84-310

IN THE

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF

ATTORNEY ROBERT J. SNYDER.

AMICUS CURIAE BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC.

NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, INC.

By: MICHAEL PANCER
625 Broadway, #1135
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(619) 236-1826

Attorneys for Amicus Curiae

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 — 275-3050

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INTERESTS OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a national organization with a membership of over 2,500 lawyers representing every state in the nation. Every member devotes a substantial portion of his or her time to the practice of criminal law which results in daily contact with the criminal justice system as an advocate, professor of law, or judge in the state and federal courts.

The NACDL is the only organization wholly dedicated to the advancement of the interests of the criminal defense bar. Among its objectives is the promotion of improvements in the administration of the criminal justice system.

Amicus submits this brief because we are concerned that our constitutional rights, as guaranteed under the First Amendment, are under jeopardy if the ruling of the Eighth Circuit is upheld. In addition, Amicus is interested in learning the standard to be applied to communications directed to the staff of a court by an attorney when those communications are not made in open court nor published by the press. The decision of the Eighth Circuit Court of Appeals in the above-entitled matter is not very helpful in elucidating the standard to be applied in such situations.

It is well settled that a court has the right and the power to maintain order in proceedings brought before it. Indeed, the proper administration of justice requires that the court proceed in an orderly fashion to ensure fairness to all litigants. However, coupled with the power to compel order in the courtroom, it is the obligation to use that power with restraint. In the past, it has been used only in circumstances which clearly demonstrated that the administration of justice would be immediately impeded. Most observers would agree that criticism of the criminal justice system as a whole concerning perceived shortcomings within it is not tantamount to condemnation of the principles on which it stands. Hence, the Eighth Circuit's use of its power to suspend ROBERT

J. SNYDER for voicing a complaint that many practitioners, including Amicus, have recognized is inappropriate when used to reprimand a real or imagined, personal affront on the court.

The "contumacious" conduct with which the Eighth Circuit took exception involved criticism of the Criminal Justice Act (CJA) and its procedures. Amicus routinely handles cases under the auspices of the CJA and like petitioner SNYDER believes that reforms in the Act are long overdue. We note that the Congress in enacting the Comprehensive Crime Control Act of 1984 revised the Criminal Justice Act, at least in part, because of complaints brought by attorneys such as petitioner SNYDER. We do not mean to suggest that unbridled criticism of the judicial system should go unpunished when the very precepts underpinning the judicial system are threatened with clear and imminent obstruction. However, the criticism vented by the petitioner was innocuous and resulted in no incapacitation of the court's ability to carry out its judicial functions.

Finally, Amicus would point out that the decision *In the Matter of Attorney Robert J. Snyder*, 734 F.2d 334 (1984), has had a profound effect upon all members of the legal community and not just the criminal defense bar. The "signal" sent to every practicing attorney by this decision is that hyperextreme care must be taken whenever any communication is directed to the court, including its staff. To do otherwise could result in suspension from the practice of one's profession.

Amicus believes that this has a "chilling effect" on all members of the Bar and is unjustified. The panel of the Eighth Circuit, before whom petitioner appeared, opined that "without public display of respect for the judiciary . . . the law cannot survive." Yet, this High Court recognized the shortcomings of that, by now discredited, view that criticism of the judicial system would result in its collapse. *United States v. Grace*, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

Amicus believes that our views coincide with those of Mr. Chief Justice Warren Burger in that the legal profession as a whole must work to change the public's perception that we are a "closed guild" and incapable of self-criticism. Accordingly, Amicus prays that this Court quash the order suspending petitioner, Attorney ROBERT J. SNYDER, issued by the Eighth Circuit Court of Appeals.

ARGUMENT

THE CORRESPONDENCE SENT TO THE SECRETARY OF THE LOWER COURT WAS NOT DISRESPECTFUL ON ITS FACE.

The Court of Appeals' order of suspension was based upon the petitioner's refusal to apologize for certain language used in a letter sent to the secretary of Judge Bruce Van Sickle. In the view of that Court, this refusal to apologize was deemed disrespectful and constituted "contumacious" conduct by the petitioner.

However, the Court of Appeals failed to establish by what standard it concluded that the language of the letter was disrespectful. The Court simply stated that "the letter speaks for itself." Order Denying Petition for Rehearing En Banc, filed May 31, 1984, page 6. The Model Rules of Professional Responsibility, as adopted by North Dakota, also do not set forth the standards by which an attorney can be adjudged disrespectful to a court mandating that sanctions be applied against him. Consequently, petitioner and Amicus do not know what constitutes disrespectful language when it is not defined. Such a amorphus standard lends itself to arbitrary application and concomitant abuse of power. This is best illustrated by the case now before the Court.

In the past, the standard which was applied to communications directed to the Court in proceedings brought before it, was

whether that statement impugned the honesty or competency of that tribunal. Thus, an attorney who accused all local courts of "crookedness" and "incompetence," such accusation being reported by the press, was properly subject to sanctions. *In the Matter of Lacey*, 283 N.W.2d 250 (1979).

Similarly, public statements made by an attorney accusing the courts of active misconduct in the prosecution of a matter involving that attorney were held to be disrespectful and merited the application of sanctions. *Florida Bar v. Weinberger*, 397 So.2d 661 (1981).

Certainly statements which have the effect of disrupting a judicial proceeding have an extremely high risk of imminently obstructing the fair administration of justice and warrant sanctions. *Pennekamp v. Florida*, 328 U.S. 331 (1946). *Bridges v. California*, 314 U.S. 352 (1941). In addition, the cases cited by the Court of Appeals *In the Matter of Attorney Robert J. Snyder*, 734 F.2d 334 (8th Cir. 1984) also stand for the proposition that when the administration of justice is immediately imperiled or held up to public scorn, sanctions are appropriate.

After careful consideration of the entire body of law relating to the difficult question now before the Court, Amicus posits that the real focus of inquiry by the courts has been on the likely effect that the statements would have on future litigants. If the statements undermine public confidence in the fair and impartial application of the law by the courts, then sanctions should be applied. On the other hand, if the statements, when fairly construed, do not evidence any impairment of the judicial function, then despite their "tactlessness," the statements do not warrant the application of sanctions.

The petitioner criticized the procedures of the CJA, but did not accuse the court of being either unethical or corrupt. It is axiomatic that the danger in permitting an accusation of corruption to go unpunished is that an order from a court perceived as

corrupt will not be obeyed. Since a court must rely on the assumption that its orders will be obeyed without significant resistance, its ability to function will be impaired in only those situations in which its very legitimacy is challenged. Since the petitioner made no such accusation, the order suspending him should be quashed because there has been no showing that there is any danger that an order issued by courts of the Eighth Circuit will not be obeyed.

An examination of the standard which has been applied in cases involving the contempt power of a court illustrates by analogy the inapplicability of sanctions in the instant case.

In order for contempt of court to properly lie, there must be an immediate or imminent interference with the functions of a court. *In Re McConnell*, 370 U.S. 230 (1962). The focus of the standard applied in contempt cases is interference with functions of the court which are judicial in nature.

Our experience teaches us that our system of resolving disputes necessarily involves friction and exchanges between advocates of opposing view points. The process is adversarial and at times passionate rhetoric is voiced before the censor of the mind can intervene. Despite the vehemence of the language, however, the court must refrain from reprisals directed at the utterer unless and until the functions of the court are actually impeded. Vehemence of language is not the test, but only a factor to consider. *Craig v. Harney*, 331 U.S. 367 (1947).

SUMMARY

In summary, the policy considerations underpinning the contempt power are virtually identical to those underlying the power of a court to order sanctions for disrespect directed to it. The complained-of statements must be of the variety that imminently and immediately impair the administration of justice. The letter and the statements therein fall short of this standard.

Our judicial system is not nearly so fragile as the Court of Appeals evidently believes. Two centuries of experience have demonstrated that our legal and political institutions can endure criticism and, indeed, become more robust for the reproof having been made.

The statements made by petitioner respecting the inadequacies of the CJA are shared by many Amicus. It is unfortunate that the issues raised in petitioner's letter did not receive the attention that they deserved simply because of the questionable taste in which they were cast. Nevertheless, Amicus prays that the order suspending the petitioner be lifted because it is an unjustified abridgment of petitioner's right to bring a problem of national importance to the attention of the courts.

Dated: December 17, 1984

Respectfully submitted,

NATIONAL ASSOCIATION OF
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(5)

No. 84-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of Attorney Robert J. Snyder, Petitioner

BRIEF OF OHIO STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:
Attorney Robert J. Snyder, Petitioner

QUESTION PRESENTED

Can disciplinary procedures of Court of Appeals constitutionally abrogate First Amendment rights of attorney?

INTEREST OF AMICUS

The Ohio State Bar Association is a voluntary association whose membership is open to all members of the Bar of Ohio. The organization has more than 17,000 members and is directed and managed by a 21 member Executive Committee elected by the membership. This Brief was authorized by unanimous vote of the Executive Committee.

The interest of the Ohio State Bar Association in this case is predicated upon its commitment to the position that the public has a right to and a need for information on the judiciary. Lawyers have the same rights and freedoms of all citizens including freedom of speech guaranteed by the First Amendment to the United States Constitution. Lawyers like other citizens are free to criticize the state of the law including rules of court, and no one shoud say that this sort

of criticism is an improper attack upon the judiciary.[1] Citizens can only properly evaluate the effectiveness of the judiciary if there is no unreasonable restriction on free speech of lawyers. The decision and order of the Court below, suspending Petitioner from practice, will impact upon lawyers' rights of free speech far beyond the reaches of North Dakota.

[1]There are now pending in the Supreme Court of Ohio proposed rules of Court that would severely limit, under pain of disciplinary action, a lawyer's right to speak to the electorate about the qualifications of candidates for judicial office.

ARGUMENT

The Court below has suspended petitioner from the practice of law in the federal courts of the United States Court of Appeals for the Eighth Circuit for a period of six months (or more) for remarks made by petitioner in a private letter to the Secretary of the United States District Court for the District of North Dakota. The basis of the suspension was that the remarks were disrespectful to the court. The remarks, in essence, complained of the small fees paid to a lawyer for indigent defense work and the added work to document entitlement to a fee. He concluded his letter by saying he would not send the court anything else, and the court could "take it or leave it." Of course, the court could have left it, and denied the fees. Instead, for this remark (and his refusal to apologize), after hearing, petitioner was suspended from practice. His request for a rehearing by the full Court of Appeals was denied.

Whether or not petitioner's conduct was of sufficient seriousness to be grounds for such drastic action (*see In re Sawyer,* 360 U.S. 622 (1959)), requires a consideration of the protection afforded by the First Amendment to the United States Constitution. It is indisputable that attorneys retain this constitutional protection even as participants in the judicial process. *In re Halkin,* 598 F.2d 176-187, *In re Primus* 436 U.S. 412, 431-32 (1978).

In a long line of cases this court has held that when government regulates activities in an area protected by the First Amendment, the regulations must be narrowly drafted to eliminate a specified evil and must not unnecessarily intrude on protected speech. See e.g. *In re R.M.J.* 455 U.S. 191 (1982); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 425 U.S. 743, 769-70 (1976); *Bigelow v. Virginia,* 421 U.S. 809, 827-829 (1975).

These cases make it clear that a person's right to freedom of speech guaranteed by the Constitution of the United States is no less by reason of having a license and privilege to practice law. It is only in those instances where unbridled speech amounts to misconduct which threatens a significant state interest that government may restrict a lawyer's exercise of rights guaranteed by the Constitution. We do not suggest, nor do the cases hold, that an attorney's right of free speech is absolute. But resting disciplinary action upon "disrespectful language" in an out of court communication is too insubstantial a base to withstand judiciary scrutiny. "Preventing a potential loss of respect by citizens for our legal institutions is not a sufficiently compelling governmental interest to justify restrictions on speech." *Bridges v. California* 314 U.S. 252, at 270 (1940).

In the instant case the "citizens" would never have known about the language had the Court not made it public. It is also probable that a "citizen" would not see that language as disrespectful. Harsh and strident, yes, but not disrespectful.

The lawyer's role as an officer of the court is to protect the fairness of proceedings. While attorneys also have some responsibility for insuring public confidence in the legal system, the system's public image cannot be protected at the cost of shielding either judges or the law itself from criticism. *In re Hinds,* 449 A. 2d 483 (N.J.). As Justice Black stated in *Bridges v. California, supra,* "the assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and an enforced silence, however limited, solely in the name of preserving dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect." 314 U.S. at 270-71.

Bitterly complaining about the complex red tape requirements to obtain a meager but well-earned fee is hardly disrespectful. And, when a court disciplines an attorney for writing as Mr. Snyder did, and refusing to apologize, it inhibits all attorneys from doing their duty to improve the system, to speak out when they should.

It is also quite possible that criticism of judges, or of the law, or of the administration of the law, may in fact be deserved. If this is so, and it clearly appears to be so in this case, then the criticism will serve to improve rather than prejudice the administration of justice. But of even greater importance in the constitutional context, there is no reason to believe critical statements about judges or the law, even when inaccurate, necessarily reduce the ability of our legal system to protect rights and do justice. *In re Hinds, supra,* at 501.

Attorneys are more knowledgeable than other citizens about the laws and how they are administered in our legal system. Attorneys often engage in disputes, and in doing so they can sometimes be assertive. There is room for disagreement on matters of taste and judgement, but not as to the fundamental right to speak as any other citizen. Preventing attorneys from communicating their views on the subjects they know best would go a long way toward isolating our legal system from public scrutiny. That is a result that a democracy should not tolerate.

CONCLUSION

The chilling effect of aggressive professional discipline by courts seeking to insulate themselves from any criticism is a source of mounting concern to lawyers throughout the country. The interests of lawyers and judges will be best served if this Court holds that petitioner's letter was well within the bounds of permissible criticism, and within his rights of free speech under the First Amendment.

Lawyers must be free to criticize the law, the administration of it, and the judiciary. That freedom should not be restricted unless there is a clearly stated compelling governmental interest to do so.

It is also clear from the record submitted that the evidence was insufficient to support the order of suspension of petitioner from the practice of law. *In re Sawyer,* 360 U.S. 622 (1959).

Respectfully submitted,

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No. 84-310

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN THE MATTER OF:

ATTORNEY ROBERT J. SNYDER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, dedicated to defending the rights secured by the Constitution and laws of the United States. The ACLU long has been particularly interested in protecting the First Amendment right to freedom of speech. The ACLU has participated, directly or as amicus curiae, in numerous First Amendment cases decided by this Court. This case raises an important First Amendment issue: whether attorneys may be disciplined for their speech to the courts in the absence of proof that the speech poses a clear and present danger to the administration of justice.

With the consent of the parties, indicated by letters lodged with the Clerk of the Court, we file this brief amicus curiae.

STATEMENT OF THE CASE

In March, 1983, Robert Snyder was appointed by the United States District Court for the District of North Dakota to represent a criminal defendant under the Criminal Justice Act (CJA), 18 U.S.C. §3006A (1982). After the proceedings in the case were completed, Snyder submitted to the District Court a claim for services and expenses.

Under the Criminal Justice Act, the Chief Judge of the Circuit Court must review and approve any expenditure greater than $1,000.00. 18 U.S.C. §3006A(d)(3). Snyder's request for compensation was deemed deficient by the Chief Judge of the United States Court of Appeals for the Eighth Circuit and was returned to the District Court with requests that additional information be provided. The claim application was revised and resubmitted. Again, it was rejected by the Chief Judge of the Court of

Appeals as lacking sufficient documentation and returned to Snyder.

Snyder discussed the matter with the secretary of the District Court responsible for processing requests for compensation. The secretary suggested that he write her a letter expressing his frustration with the administration of the Criminal Justice Act. In re Snyder, 734 F.2d 334, 343 (8th Cir. 1984) (en banc). Pursuant to this suggestion, Snyder wrote a letter to the secretary* in which he stated that he was "appalled" by how little money attorneys received for representing indigents. He stated that few attorneys in Bismarck, North Dakota represent indigents because of the low pay. He further complained that not only is the pay inadequate, but also attorneys have to go through "extreme

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* The letter is reprinted as an appendix to the Court of Appeals decision, In re Snyder, 734 F.2d 334, 344 (8th Cir. 1984).

gymnastics even to receive the puny amounts which the federal courts authorize for this work." The letter further stated that he had submitted all the documentation he had concerning his representation and there was nothing else to send. Snyder concluded by stating that he was "extremely disgusted" by the way the Eighth Circuit was handling the matter and instructed the secretary to remove his name from the list of attorneys willing to accept indigent criminal defense work.

Snyder's letter to the secretary of the District Court was forwarded to the Court of Appeals. Upon receiving it, the Chief Judge of the Eighth Circuit wrote to the District Court and requested that it confer with Snyder and "determine if Snyder would retract his disrespectful remarks to the court." In re Snyder, 734 F.2d at 336. Snyder refused and the Court of Appeals issued an order to show cause "why he should not be suspended from the

practice of law in the federal courts for his refusal to offer services under the CJA." In re Snyder, Id. at 336.

After holding a hearing on the matter, the Eighth Circuit found that because North Dakota's plan is entirely voluntary, Snyder was allowed to request not to be assigned cases under the Criminal Justice Act. Id. at 339. Furthermore, it accepted Snyder's agreement to handle future appointments of CJA cases. Id. at 339. In fact, the Eighth Circuit found "merit" in Snyder's complaints about the administration of the CJA. Id. at 338-39.

Nonetheless, the Court of Appeals suspended him from the practice of law in the federal courts of the Eighth Circuit for a period of six months. The court stated that it found his letter to contain "disrespectful remarks" and it concluded that "[w]ithout hesitation we find Snyder's disrespectful

statements as to this court's administration of CJA contumacious conduct." Id. at 337.

Snyder petitioned the Eighth Circuit for a rehearing en banc. The Court of Appeals denied the petition, concluding that Snyder's letter was "disrespectful" and not protected by the First Amendment. Id. at 343. The Court of Appeals, however, stated that because of Snyder's past handling of several CJA cases and his professed willingness to take similar cases in the future, it would vacate the order of suspension and provide an additional ten days for Snyder "to provide a sincere letter of apology to this Court for the disrespectful comments directed to this Court in his letter." Id. at 344.

SUMMARY OF ARGUMENT

The issue in this case is whether an attorney may be disciplined for true statements critical of a court simply because the court dislikes the tone of the statements.* Robert Snyder was suspended from practice solely because the Court of Appeals found his letter to the District Court to be "disrespectful." In re Snyder, 734 F.2d at 337, 343 (8th Cir. 1984). The Court of Appeals agreed with Snyder that there are major problems with the implementation of the Criminal Justice Act. 734 F.2d at 337-341. Nonetheless, the court suspended him because it did not like the tone and words he used in addressing the court.

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*This case also poses important questions concerning the circumstances under which judges should recuse themselves and the notice that is required by the Due Process clauses of the Fifth and Fourteenth Amendments. Amicus is in agreement with the arguments made on these issues in Petitioner's brief.

Speech by attorneys is an essential way of exposing problems in the system and pressuring for reform. By virtue of their knowledge and dealings with the judiciary, lawyers have a unique ability to help improve the administration of justice. At times, attorneys must vigorously advocate their clients' positions and criticize the way in which the courts are treating their clients' cases. See In re Sawyer, 360 U.S. 622, 631-32 (1959). At times, attorneys must speak out about injustices they perceive in the administration of the courts. Such speech serves an invaluable public purpose and is protected by the very core of the First Amendment. See New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

Robert Snyder's letter to the secretary of the district court was exactly the type of speech which should be encouraged. He was writing to a branch of the United States

government for redress of his grievance: his failure to receive prompt payment for services provided to an indigent criminal defendant. Furthermore, his letter complained about the administration of an important government program and the failure of the government to provide adequate representation of indigents. Attorneys perform an essential public function when they complain in this manner. Snyder's letter prompted the United States Court of Appeals for the Eighth Circuit to propose a reconsideration of the manner in which the CJA is implemented in North Dakota. In re Snyder, 734 F.2d at 337-341. Snyder thus was performing the highest mission of the bar in seeking to improve the system.

Speech about courts does not lose its protection just because it is harsh or even disrespectful. In re Sawyer, 360 U.S. 622, 631-32 (1959); Craig v. Harney, 331 U.S. 367,

372 (1947). Courts, like all parts of government, may be criticized, even in intemperate tones. Landmark Communications, Inc. v. Virginia, 436 U.S. 829, 839 (1978).

It is firmly established that speech about courts may be punished only if it poses a clear and present danger to the administration of justice. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845-46 (1978); Wood v. Georgia, 370 U.S. 375, 388 (1962); Craig v. Harney, 331 U.S. 367, 372 (1947); Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Bridges v. California, 314 U.S. 252, 262 (1941). Speech never poses a clear and present danger just because it is critical of the courts. In order to discipline an attorney for his or her speech, there must be proof that the attorney's statements actually interfered with a pending judicial proceeding. No such interference is even hinted at in this case.

ARGUMENT

THE FIRST AMENDMENT PROHIBITS A COURT FROM DISCIPLINING AN ATTORNEY FOR EXERCISING HIS RIGHT TO FREEDOM OF SPEECH UNLESS THERE IS A CLEAR AND PRESENT DANGER TO THE ADMINISTRATION OF JUSTICE

A. Robert Snyder's Speech Was Political Speech, Protected by the Core of the First Amendment

The Eighth Circuit was explicit: Robert Snyder was suspended from practice because of the content of his letter to the court and because of his failure to apologize for it. The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." Wooley v. Maynard, 430 U.S. 705, 714 (1977). Thus, both Robert Snyder's letter to the court and his refusal to apologize for the statements made are constitutionally protected speech.

1. Robert Snyder's letter to the court was speech petitioning government for redress of his grievances, protected by the First Amendment.

The First Amendment to the United States Constitution protects the "right of the people . . . to petition the Government for a redress of grievances." This Court repeatedly has held that the right to "petition the Government for redress of grievances" is "among the most precious of the liberties safeguarded by the Bill of Rights." United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 222 (1967); Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 137 (1961). Individuals who feel that they are being treated unfairly or improperly by the government are to be encouraged, not punished, for voicing their complaints.

The right "to have one's voice heard and one's view considered by the appropriate government authority" is the very essence of

democracy. Williams v. Rhodes, 393 U.S. 23, 41 (1968) (Harlan, J., concurring). This fundamental right to petition government may not be conditioned by a state upon "the exaction of a price," Garrity v. New Jersey, 385 U.S. 493, 500 (1967), or "punishment," Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940), or "threat of criminal or civil sanctions." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

Robert Snyder was suspended from practice solely on the basis of a letter in which he presented his grievances to the United States government. Snyder letter complained to the government about the inadequate sums he received for representing indigents and his failure to receive prompt payment for services provided. The Court of Appeals admitted that Snyder had legitimate grievances concerning the administration of the Criminal Justice Act. In re Snyder, 734 F.2d at 338. In fact, in 1984,

the United States Congress amended the Criminal Justice Act to double the salary paid to attorneys representing indigents under it. Criminal Justice Act Revision of 1984, P.L. 98-473 §1901, 98 Stat. 2185, 2185-86.

Thus, there is no question that Snyder acted responsibly in attempting to air his grievances. His letter was truthful in its assertions; he had a legitimate grievance over the sums of money paid and his failure to receive payment for the work completed. He addressed his grievance to the appropriate government body, the federal courts responsible for administering the CJA. As such, Robert Snyder's letter is speech petitioning the courts for redress of his grievances, protected by the very core of the First Amendment.

2. Robert Snyder's letter to the court was speech about the conduct of government, protected by the First Amendment.

This Court has long held that speech about the conduct of government and its officials is protected by the First Amendment. New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Even apart from his personal grievances, Robert Snyder's letter to the secretary of the District Court was exactly this type of speech: speech complaining about the administration of a government program. Snyder wrote to the secretary of the District Court to complain about the delay in processing payment to attorneys representing indigents under the Criminal Justice Act. His letter also complained about the conduct of the government, the Congress and courts of the United States, in providing for the representation of indigents. He voiced concern that "few attorneys" provide representation because of

the "appall[ing]" amount which the federal courts pay for such work. 734 F.2d at 344. He concluded by expressing "disgust" at the treatment of attorneys by the Eighth Circuit. Id. 734 F.2d at 344.

Every aspect of Snyder's letter was a complaint about the performance of government. It was written, at the suggestion of the secretary in the District Court to whom it was directed, in the hope of encouraging reform in the administration of the CJA. Id. 734 F.2d at 343. In fact, the Eighth Circuit's opinion indicated that Snyder was at least partially successful; the Court of Appeals agreed with him that there was a need to reform the system and referred the matter to the district courts and the Judicial Council. Id 734 F.2d at 339-40.

There is no doubt that Snyder's speech was about a "public question" of enormous social importance. See New York Times v. Sullivan,

376 U.S. at 269 (First Amendment protection for "expression upon public questions"). As this Court stated in Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978), "[t]he operation of the courts and the judicial conduct of judges are matters of utmost public concern." The Eighth Circuit acknowledged that the bar has been criticized for its failure to provide effective representation of indigents. In re Snyder, 734 F.2d at 340. Speech attempting to improve the system of appointing counsel to represent indigents is political speech in its classic form, protected by the First Amendment.

Words like "appalled" and "disgusted" are the sort of language that is commonly used in political discourse. Even if it is strong language, that does not deprive it of constitutional protection. See Cohen v. California, 403 U.S. 15 (1971). The First

Amendment always has been held to protect "vigorous advocacy." National Association for the Advancement of Colored People v. Button, 371 U.S. 415, 429 (1963). As this Court declared in New York Times v. Sullivan, 376 U.S. at 270:

> "[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Nor does the speech lose constitutional protection because it was included in a private letter to the secretary, rather than in a public pronouncement. Givhan v. Western Consolidated School District, 439 U.S. 410, 415-16 (1979). Snyder chose the channel for communication which was most likely to be successful and least likely to interfere with the administration of justice.

It is essential that attorneys be able to speak and complain in just the way that Snyder did. By virtue of their expertise and dealings with the courts, attorneys have special knowledge about how the judiciary is functioning. Lawyers must be encouraged to expose problems in the system, not disciplined for doing so. The American Bar Association's Model Code of Professional Responsibility states that: "By reason of education and experience, lawyers are especially qualified to recognize deficiencies in [that] system and to initiate corrective measures." Ethical Consideration 8-1. Attorneys historically have played a crucial role in exposing problems with the administration of justice and pressuring for improvements.

In prior decisions, such as In re Sawyer, 360 U.S. 622, 631-36 (1959), this Court recognized that a lawyer's freedom to criticize the legal system is an integral component of

professional responsibility. In Sawyer an attorney was suspended from practice for one year for criticizing the way in which a federal district court handled certain criminal proceedings. The Supreme Court of Hawaii ordered the attorney suspended for attacking the administration of justice and impugning "the integrity of the judge" and "tend[ing] to also create disrespect for the courts of justice and judicial officers generally." 360 U.S. at 626. This Court reversed the suspension order, strongly affirming the First Amendment right of attorneys to criticize the law, law enforcement agencies, and the courts. 360 U.S. at 631-32. The Court recognized that "oftentimes the law is modified through popular criticism," citing the historical examples of the writings of Bentham and Dickens in helping to change the system. 360 U.S. at 632.

Simply put, speech by attorneys is "the handmaiden of effective judicial administration." Sheppard v. Maxwell, 384 U.S. 333, 350 (1966). Attorneys must be encouraged to speak out to help improve the system and to provide zealous representation of their clients. If attorneys can be punished for criticizing the courts, an irreplaceable source of pressure for positive change will be lost. An attorney, such as Robert Snyder, who calls attention to a serious problem in providing for representation of indigents should be commended, not disciplined.

3. Because Robert Snyder's First Amendment rights include the right not to speak, he may not be disciplined for refusing to apologize.

The First Amendment protects not just the right to speak; it also safeguards the right to refrain from speaking. For example, in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), this Court held that students could not be required to participate in daily

ceremonies honoring the flag with words and gestures. Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), this Court struck down a law which required all motorists to use license plates bearing the New Hampshire state motto, "Live Free or Die." The Court emphasized that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of the mind.'" 430 U.S. at 714. See also Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257 (1974).

Robert Snyder was punished for his refusal to speak -- his refusal to utter an apology for the letter he wrote. The Eighth Circuit in its en banc ruling vacated the suspension order for ten days pending receipt of a "sincere letter of apology." In re Snyder, 734 F.2d at 344. His silence, therefore, was the immediate cause of his suspension from practice. But this silence was speech protected by the First

Amendment and the silence cannot constitutionally be the basis for sanctions.

It is unclear what purpose the court thought an apology would serve. If Snyder somehow had interfered with the administration of justice as the Eighth Circuit stated, 734 F.2d at 336, then his apology would do nothing to rectify that wrong. Demanding a "sincere apology" is coercion of conscience exactly of the sort that this Court has disapproved. Because the court of appeals was willing to forego sanctions if Snyder apologized, and since he cannot be punished for his silence, then the court should not be allowed to suspend him when he chose not to speak.

B. No Compelling Government Interest Exists to Justify Punishing Robert Snyder for his Speech

First Amendment rights are not absolute. However, given their enormous importance "only a compelling state interest . . . can justify limiting First Amendment freedoms." National Association for the Advancement of Colored People v. Button, 371 U.S. 415, 438 (1963). Traditionally, the measure of whether a sufficiently compelling interest exists is whether the speech in question poses a "clear and present danger." Schenck v. United States, 249 U.S. 47, 52 (1919); Thornhill v. Alabama, 310 U.S. 88, 105 (1940). In numerous decisions, this Court has held that speech about courts may be punished only if a clear and present danger to the administration of justice is proven. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 845-46 (1978); Wood v. Georgia, 370 U.S. 375, 388 (1962); Craig v. Harney, 331 U.S. 367, 372 (1947);

Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Bridges v. California, 314 U.S. 252, 262 (1941). "What emerges from these cases is the working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before the utterances can be punished, and that a solidity of evidence is necessary to make the requisite showing of imminence. The danger must not be remote or even probable; it must immediately imperil." Landmark Communications, Inc. v. Virginia, 435 U.S. at 845 (citations omitted).

Speech does not pose a clear and present danger just because it is critical of a court or even "disrespectful." In Craig v. Harney, 331 U.S. at 376, this Court declared, "[t]his was strong language, intemperate language, and we assume, an unfair criticism. But a judge may not hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him." A judge cannot

be permitted to shield himself or herself, or the court from all criticism by labelling it "disrespectful" or "contumacious."

In a democracy, government and government officials always are subject to criticism. Any criticism might be regarded as disrespectful. Yet, it is unthinkable in our society that a person could be punished for criticizing the President, or an administrative agency, or a member of Congress, simply because the criticism is vehement or might cause disrespect for the institution. The First Amendment embodies the commitment that good government is achieved through "uninhibited, robust, and wide-open . . . debate on public issues." New York Times v. Sullivan, 376 U.S. 254, 270 (1964). Public respect for government is gained by encouraging individuals to improve government, not by enforcing silence.

It is firmly established that courts and judges are a part of government and that the "law gives '[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions." Landmark Communications, Inc. v. Virginia, 435 U.S. at 839 (quoting, Bridges v. California, 314 U.S. at 289 (Frankfurter, J., dissenting)). In fact, in this case, Snyder's speech concerned the court's administrative functions, its executive task in implementing the CJA, and not an aspect of the court's adjudicative responsibilities. At the very least, when a court is performing as an administrative body it should be subject to the same criticisms as any similar agency. In re Oliver, 452 F.2d 111, 113-14 (7th Cir. 1971).

In short, speech cannot be punished just because it offends the court and seems disrespectful. In re Little, 404 U.S. 553, 554 (1972). As this Court cautioned, "courts . . .

must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." Brown v. United States, 356 U.S. 148, 153 (1958). In Craig v. Harney, 331 U.S. at 376, the Court explained that "the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Speech about courts only may be punished if there is clear proof of an imminent harm. No such risk is even hinted at in the record here.

The Eighth Circuit suggested two ways in which Snyder's speech posed a sufficient harm to justify suspending him from practice. First, the court found his letter to be an "explicit statement of disrespect to the court" and concluded that "[w]ithout public display of respect for the judicial branch of government

as an institution by lawyers, the law cannot survive." In re Snyder, 734 F.2d at 736, 737. At the very least, it is impossible to see how Snyder's speech undermines public confidence in the courts because his letter was sent privately to the secretary and only became public when the Eighth Circuit decided to begin proceedings to suspend him and published the letter.

Furthermore, this Court repeatedly has held that courts cannot use their desire for institutional respect as an excuse for suppressing speech. Landmark Communications, Inc. v. Virginia, 435 U.S. at 842-843; Craig v. Harney, 331 U.S. at 376-77; Bridges v. California, 314 U.S. at 270-71. In Landmark Communications, Inc. v. Virginia, this Court explicitly rejected the contention that preserving public confidence in the courts justifies censoring speech. The Court held that neither the government's "interest in

protecting the reputation of judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent suppression of speech." 435 U.S. at 841. Even if in some remote way Snyder's speech might cause some individuals to think less of the courts, the appropriate solution is for the courts to improve the administration of the CJA, not to punish the messenger who informed the public of the bad news.

Finally, in the long run, public confidence in the judiciary will be undermined if the public perceives that judges are afraid of hearing criticism and have erected a shield to protect themselves from their critics. As Justice Black observed in Bridges v. California, 314 U.S. at 270-71:

> "The assumption that respect for the judiciary can be won by shielding judges from public criticism wrongly appraises the character of American

> public opinion . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."

Every time a law professor or a reporter writes an article criticizing a court decision there is a chance that some people will think less of the judiciary. Yet, it is unimaginable that such critiques ever would be punished no matter how vehement or disrespectful the tone. Snyder cannot constitutionally be disciplined just because he voiced his objections in a letter to the court, rather than published them in the local newspaper.

The second harm mentioned by the Eighth Circuit is that Snyder's "conduct not only constituted disrespect but served as well to impede the orderly processing of attorney fee applications. In this direct sense he has served to impede the effective administration of justice." In re Snyder, 734 F.2d at 336.

The court, however, did not explain how Snyder's letter, which the judge's secretary solicited, impeded the processing of fee applications or the administration of justice. Both the District Court judge and the secretary responsible for administering payments under the CJA submitted affidavits to the Eighth Circuit in support of Snyder. Neither affidavit intimated even the slightest manner in which Snyder's actions harmed judicial administration.

There, of course, is no doubt that courts have a compelling interest in insuring the orderly and fair administration of justice. Speech, however, only may be punished if there is clear proof of an "imminent, not merely a likely, threat to the administration of justice." Craig v. Harney, 331 U.S. at 376; Pennekamp v. Florida, 328 U.S. at 348. Here there is no evidence that Snyder's speech posed

even the slightest threat. He was not interfering with the trial or appeal in any case; his speech did not disrupt any court proceedings. His letter did not delay the processing of any applications for compensation. Even if Snyder wrote a more "respectful" letter, the effect on the operation of the courts would have been the same. In fact, Snyder's letter did not impair the administration of justice, but rather enhanced it by encouraging the Eighth Circuit to reconsider the manner in which the CJA is administered.

This case is not really about undermining public confidence in the courts or impairing the administration of justice. Rather, Robert Snyder was disciplined because the Eighth Circuit was offended by the tone of his letter. Both the secretary who the letter was addressed to and the District Court judge for whom she was working stated that they were not offended.

But the Eighth Circuit was and suspended Snyder because of it. However, in cases such as Cohen v. California, 403 U.S. 15 (1971), this Court has made clear that courts may not punish speech just because it is vulgar or offensive. In fact, if speech is to be effective it often must be offensive in order to gain people's attention and get the message across.

Unless there is proof that an attorney's speech impermissibly interferes with pending judicial proceedings or prevents a fair trial, no discipline should be allowed. Because Robert Snyder's speech did not pose any threat, let alone a clear and present danger, his suspension from practice is unconstitutional.

C. Robert Snyder's Suspension from Practice Violated His First Amendment Rights

Like other citizens, attorneys are entitled to the full protection of the First Amendment. In re Sawyer, 360 U.S. 622 (1959); Konigsberg v. State Bar, 353 U.S. 252 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). Courts violate the First Amendment if they discipline attorneys for their speech in the absence of a clear and present danger to the administration of pending judicial proceedings. Robert Snyder was suspended from practice based solely on his letter and his refusal to apologize. Because there was no compelling interest, no clear and present danger, to justify the government's conduct, his suspension violates the First Amendment.

If attorneys are to perform their crucial role in working to improve the administration of justice, they must be encouraged to speak out and expose problems in the system. Robert

Snyder's suspension delivers a message to all attorneys that advocacy for their clients risks grave sanctions. The expression of ideas, crucial messages about the need for reform and improvement, inevitably will be chilled. The First Amendment requires that attorneys be allowed to speak, even vigorously, to improve the courts and society.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eighth Circuit, suspending Robert Snyder from the practice of law in the courts of the Eighth Circuit for six months, should be reversed.

Respectfully submitted,

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(6)

No. 84-310

In The

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF ATTORNEY
ROBERT J. SNYDER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

1. Whether the disciplinary procedures of the Eighth Circuit Court of Appeals can constitutionally abrogate the First Amendment Rights of Attorney Robert J. Snyder.

2. Whether the disciplinary procedures of the Eighth Circuit Court of Appeals afforded Robert J. Snyder due process of law as envisoned by the Constitution of the United States.

PARTIES TO THE ACTION

The parties in this action are Attorney Robert J. Snyder and the United States Court of Appeals for the Eighth Circuit.

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The opinion of the Court of Appeals (J.A. 55-69) is reported at 734 F.2d 334 (8th Cir. 1984). This decision was a response to the Court's own Order to Show Cause why Attorney Robert J. Snyder should not be suspended from practice in the Federal courts.

The second opinion of the Court of Appeals (J.A. 88-95) is reported at 734 F.2d 341 (8th Cir. 1984). The second decision was in response to a Petition for Rehearing en banc of the original order.

JURISDICTION

The decisions of the Eighth Circuit Court of Appeals were filed April 13, 1984, and May 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment 1 provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the government for redress of grievances.

2. United States Constitution, Amendment 5 provides in pertinent part:

> No person shall . . . be deprived of life, liberty, and property without due process of law. . . .

STATEMENT OF THE CASE

On October 6, 1983, Attorney Robert J. Snyder (hereinafter Snyder) wrote a letter to Helen Monteith (here-

inafter Monteith), secretary to the Honorable Bruce M. Van Sickle, Judge of the United States District Court for the District of North Dakota (hereinafter Judge Van Sickle), which letter read:

> Dear Helen:
>
> I am in receipt of the letter of September 26, 1983, from the Eighth Circuit Court of Appeals, in which our latest attempt to justify our time and expenses for Dennis Warren has again been sent back. This letter is for the purpose of responding to that letter.
>
> In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.
>
> Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.
>
> Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.
>
> Thank you for your time and attention.
> Very truly yours, (J.A. 14-15).

That letter was forwarded to the Eighth Circuit by Monteith and on December 22, 1983, the Eighth Circuit issued an Order to Show Cause to Snyder (J.A. 21-23). Snyder filed a Return to Order to Show Cause on January 16, 1984, (J.A. 23-31). On February 16, 1984, Snyder appeared before the Eighth Circuit panel (See Transcript of Proceedings, J.A. 31-50).

At the hearing, in addition to the items which were set forth in the Order to Show Cause, discussion ensued regarding the content of Snyder's letter to Monteith and the Eighth Circuit requested that Snyder apologize for the letter. Snyder declined and the Eighth Circuit in an opinion filed April 13, 1984, (J.A. 55-69 stated):

> We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter Snyder should make application to both this court and the federal district court of North Dakota to be readmitted. (J.A. 61).

A petition for rehearing en banc was filed (J.A. 70-87). The Eighth Circuit, on May 31, 1984, issued an order denying the petition for rehearing en banc (J.A. 88-95) with Judges Bright and McMillan taking the position that the petition for rehearing en banc should be granted.

A petition for certiorari was filed with this Court and granted on January 14, 1985, — U.S. — (1985).

On March 14, 1983, Judge Van Sickle, appointed Snyder as counsel for Dennis Warren in a federal criminal case filed in that court. Snyder completed the work on the case and submitted CJA Form 20 certifying the amount of work done and the dates of the work and the reimbursable expenses and requested payment of $1,898.55 (J.A. 1). Judge Van Sickle approved payment in the amount of $1,796.05 and forwarded the form to the administrative office of the Eighth Circuit. The form

was returned by June Boadwine by memorandum to Judge Van Sickle on September 6, 1983, requesting further information (J.A. 2).

On September 20, 1983, Snyder sent a letter to Monteith, Judge Van Sickle's secretary, and included a copy of his billing records relating to the Warren case (J.A. 3-12). The documents were sent to the Eighth Circuit and on September 26, 1983, by memorandum from June Boadwine to Judge Van Sickle, request was made for further itemization of time and out-of-pocket expenses (J.A. 13). That memorandum was forwarded to Snyder and on October 6, 1983, Snyder sent the letter to Monteith, which is quoted above (J.A. 14-15). In that letter, Snyder said, among other things, that:

> Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it. (J.A. 15).

Chief Judge Donald P. Lay (hereinafter Judge Lay) on November 3, 1983, wrote to Judge Van Sickle and enclosed a copy of Snyder's letter (J.A. 15-18). In that letter, Judge Lay states:

> I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process in the courts. (J.A. 16).

Judge Lay further states:

> However, when a lawyer becomes disrespectful and refuses to follow the guidelines and refuses to cooperate with the court, then it is a more significant problem.
>
> Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be

> appointed to represent indigent criminal defendants. As far as the court is concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, *I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practice in any federal court in this circuit for a period of one year.* Suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made. (J.A. 17-18) (emphasis added).

Judge Lay again wrote to Judge Van Sickle on November 15, 1983, and stated:

> At this point, *I feel if Mr. Snyder wishes to write the court offering his apology to the court for his disrespectful comments* and assuring the court that he will in the future be willing to comply with the requirements of the CJA and the guidelines, *I will then be willing to recommend to the court that the order to show cause not be filed* and, as a result, become public record.
>
> Should Mr. Snyder choose not to honor this request, it will then become necessary for me to have the show cause order issued. I would appreciate your contacting Mr. Snyder in this regard. (J.A. 18-19) (emphasis added).

Judge Lay then exercised his administrative powers and cut the compensation that Snyder was to receive in the Warren case to only $1,000 and out-of-pocket expenses in the sum of $23.25. Judge Van Sickle responded to Judge Lay's request on December 12, 1983, and indicated that he had had several conversations with Snyder and that Snyder:

> . . . sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. (J.A. 20).

Judge Lay on December 22, 1983, caused to be filed an Order to Show Cause directed to Snyder (J.A. 21-23).

The text of the Order to Show Cause clearly indicates it was directed to Snyder's request to have his name removed from the list of attorneys who represent indigent criminal defendants and his alleged refusal to comply with the guidelines for payment of attorney's fees pursuant to the Criminal Justice Act.

The Show Cause Order stated:

> In view of Mr. Snyder's refusal to carry out his obligations as a practicing lawyer and as an officer of this court, he is hereby ordered to show cause within 30 days of this order as to *why he should not be suspended from practicing* in the federal district court, as well as the United States Court of Appeals for the Eighth Circuit, *for such period of time as his refusal to serve continues. . . .* (J.A. 22) (emphasis added).

Snyder filed a return to the order (J.A. 23-31) and in the return pointed out that the plan that was in effect in North Dakota pursuant to the Criminal Justice Act of 1964 was a voluntary plan in that it provided in pertinent part:

> The State Bar Association of North Dakota, acting by and through its appropriate committee, has recommended a list of attorneys who, in the opinion of such Bar Association, are competent to give adequate representation to parties under the act, and *who are willing to serve.* (J.A. 29) (emphasis added).

Snyder pointed out in the return that his statement to Monteith in the October 6th letter was simply a demonstration of his unwillingness to continue to serve on the panel. He further pointed out that if he could be compelled to continue to represent indigent clients in federal cases, then that compulsion should be extended to all attorneys who practice within the Southwestern Division

of the District of North Dakota regardless of their willingness to serve. He further pointed out in his return that the North Dakota plan needed revision (J.A. 30).

Snyder included in his return a request for a hearing before the full court (J.A. 31); however, that request was denied and a three-judge panel consisting of Judge Lay and Judges Arnold and Heaney conducted the show cause hearing. Snyder also requested that Judge Lay recuse himself from consideration of the matter, which request was denied and on February 16, 1984, Snyder appeared before the panel in St. Paul, Minnesota. A transcript of those proceedings is contained at pages 31 through 50 of the Joint Appendix.

During the hearing, Snyder amplified on his return to the order to show cause. Judge Lay then brought up the matter of the letter of October 6, 1983, to Monteith (J.A. 33). Snyder pointed out that he had no problem with the compensation remaining as it was if the plan was equally applied and further pointed out that since 1980 of the 256 lawyers in the Southwestern Division of North Dakota, only 30 were appointed to criminal cases, 20 to drug cases, 10 to serious felonies, and only 4 or 5 to murder and rape cases (J.A. 36).

Judge Arnold later brought up the October 6 letter (J.A. 36-37) and indicated that he was "bothered by the tone of the letter" and Judge Arnold stated:

> *I am asking you, sir, if you are prepared to apologize to the court for the tone of your letter.* (J.A. 40) (emphasis added).

Snyder responded:

> *That is not the basis that I am being brought before the court today.* (J.A. 40) (emphasis added).

Snyder further pointed out that he had been directed to apologize previously and had declined to do so and stated:

> But, I didn't apologize then and I'm not apologizing now, and by the way, that letter was not sent to the Eighth Circuit, it was sent to Helen Monteith. (J.A. 41).

Judge Arnold then stated:

> All right. I just want to get this clear, that *you are declining to apologize for the letter of October 6.* (J.A. 41) (emphasis added).

Snyder responded that he was declining to apologize for the letter, but again pointed out "but that's also not the basis of this proceeding." (J.A. 41). Judge Arnold then cut in and stated:

> It is the basis of another proceeding. Because you have a duty as a lawyer to behave yourself in a respectful fashion, just as the courts have a duty to try to understand the problems of bar to behave with courtesy towards members of the bar and I have to say, that I think you are failing in your duty. (J.A. 41).

There was then further discussion between the court and Snyder and Judge Lay stated:

> I have given you every opportunity to simply apologize to the court and to indicate that you will continue with your criminal obligations. That is all I asked Judge Van Sickle to ask you. You refused to do that. *In the order to show cause, which is very simply and succinctly stated, I gave you every opportunity to purge*—you wouldn't even have had to bother to the extents of coming down here—*by simply writing to the court and saying "Yes, you would continue to serve in pro bono obligations w'.en asked, and that you will continue to comply with the guidelines". That is all you have to do at any time in order to be accepted in this court on good standing.* Your refusal to do that will probably lead to your suspension, not only in this

> court, but in the federal district courts. And, it seems to me, that's the road you wish to travel. And your—I just caution you, that your choosing that road yourself. (J.A. 43) (emphasis added).

Judge Lay then indicated that the inequities of the plan that Snyder pointed out in his return to the order to show cause were of concern to the court (J.A. 44) and that he was making an independent investigation of them. Snyder then pointed out that if he was to be suspended the situation in his district would become worse than it already was and that it was his opinion that "I don't think you're going to find anybody who will take a case." (J.A. 44). Judge Lay replied, "Well then, maybe they all will be suspended from practice." (J.A. 45).

Judge Lay then stated:

> I will give you ten days, Mr. Snyder, *if you wish to write a letter to the court and purge yourself* of the concern of the court; *all it is is a simple statement that you will take pro bono assignments of the federal courts and that you will comply with the guidelines if you are asked to do so.* If you choose not to do that, then simply notify the court and then we will take it upon ourselves to so act. (J.A. 45) (emphasis added).

Judge Arnold then again directed the conversation to the letter of October 6th (J.A. 45). Judge Lay again suggested that he was confident that the plan would be revised to express that every lawyer has within his obligation a duty to render pro bono work and at the conclusion of the hearing, Judge Lay stated:

> I want to make it clear to Mr. Snyder what it is the court is allowing you ten days lapse here, a period for you to consider. One is, that, *assuming there is a general requirement for all competent lawyers to do pro bono work, that you stand willing and ready*

to perform such work and will comply with the guidelines of the statute. (J.A. 50) (emphasis added).

Had Judge Lay stopped there, there would have been no problem because that was precisely the subject of the Order to Show Cause and Snyder had no problem agreeing to those requests or requirements. However, Judge Lay then strayed beyond the content of the order to show cause and stated:

> And secondly, *to reconsider your position as Judge Arnold has requested, concerning the tone of your letter of October 6th.* I think that's all we wish to hear about, and if you choose not to take any action, you are to so notify the court within ten days. (J.A. 50) (emphasis added).

On February 22, 1984, Snyder sent a letter to the Eighth Circuit (J.A. 51-52) wherein he stated that if a new plan for the implementation of a Criminal Justice Act in the State of North Dakota was enacted, he would obey its mandates and further, he would make every good faith effort to comply with the guidelines regarding the payment of attorney's fees and expenses. That is precisely what Judge Lay had requested Snyder to do to purge himself until the final comment made by Judge Lay referring to Judge Arnold's concern regarding the tone of the letter of October 6th and a call for an apology regarding that letter. On February 24, 1984, Judge Lay acknowledged Snyder's letter and by return letter stated:

> The *court expressly asked you if you would be willing to apologize for the tone of the letter* and disrespect displayed. You serve as an officer of the court and as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution. Before circulating your letter of February 23, *I would appreciate your response to Judge Arnold's*

> *specific request,* and the court's request, *to apologize for the letter you wrote.* (J.A. 52-53) (emphasis added).

It is thus clear from Judge Lay's letter that the only concern that the court yet had was Snyder's failure to "apologize" for the content of the October 6, 1983, letter to Monteith. It is equally clear that the Order to Show Cause did not order Snyder to show cause why he should not be suspended from practice for refusal to apologize for the letter. Had the Order to Show Cause so directed, Snyder's response would have included appropriate references to his First Amendment rights and privileges.

On February 27, 1984, Snyder wrote to Judge Lay acknowledging receipt of Judge Lay's letter and then stated:

> I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. (J.A. 53-54).

Thereafter on April 13, the Eighth Circuit in an opinion authored by Judge Lay (J.A. 55-69) ordered:

> We find that Robert Snyder shall be suspended from the practice of law in the Federal Courts of the Eighth Circuit for a period of six months; thereafter, Snyder should make application to both this court and the federal district court of North Dakota to be readmitted. (J.A. 61).

An analysis of that opinion indicates that the court correctly states that Snyder was cited in the Order to Show Cause for his alleged refusal to continue to perform services in indigent cases and his alleged refusal to comply with the court's guidelines under the CJA Act. The court then points out that Snyder was requested to purge himself:

> by agreeing to accept appointment under the Act and by otherwise complying with the Act's guidelines. (J.A. 57).

Snyder agreed to take CJA appointments and follow the guidelines in the letter to Judge Lay dated February 22, 1984 (J.A. 51-52); however, the court then goes beyond the matters contained in the Order to Show Cause and states:

> *The panel also requested him* to demonstrate in writing that he would be respectful in his relations with the federal courts and *to offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October 6.* (J.A. 57-58) (emphasis added).

The court correctly indicates that Snyder offered his continued services under the CJA Act and then added that he:

> contumaciously refused to retract his previous remarks or apologize to the court. (J.A. 57-58).

The court again points out in its opinion (J.A. 59) that Snyder had conditionally offered to serve in indigent cases and comply with the CJA guidelines, but the court did not find that satisfactory and stated:

> *However,* in a letter to the court *he has otherwise refused to retract or apologize for his disrespectful remarks to the court.* (J.A. 59) (emphasis added).

The court then stated:

> We find Snyder's present statement that he will conditionally comply with the guidelines is not enough. *His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate* to this court *that he is not presently fit to practice law in the federal courts.* (J.A. 60) (emphasis added).

It is therefore clear that the only reason the court suspended Snyder was for his continued refusal to apologize for the remarks made in the October 6th letter to Monteith. The court then refers to the necessity of a public display of respect for the judicial branch and further indicates that respect must be shown when the courts are carrying out a judicial function. (J.A. 60). It must be pointed out, however, that the letter which is of concern to the court was not a letter made public until after the court raised an issue about it. It was a private letter directed to a secretary of a federal district judge; it was a private letter which was not released to the media or to any other institution or individual by Snyder; and finally, the only reason that it has become public is by virtue of the actions taken by the Eighth Circuit in this matter.

The court then concluded that Snyder should be suspended from practice. It is clear that the suspension relates to the content of the letter and the failure to apologize for it and does not and cannot relate to the two reasons set forth in the Order to Show Cause. In its opinion, the Eighth Circuit talked extensively about the CJA Act and the plan that was in effect in North Dakota, a plan approved by the Eighth Circuit many years before and concluded that there were problems with that plan. The court stated:

> Because Snyder is participating under a plan which is purely voluntary, *his refusal to serve is in technical compliance with the plan.* However, *his conditional agreement to serve in the future,* if other attorneys who are competent to try cases are included on the panel, *also has considerable merit.* Under the Criminal Justice Act, each district is required to submit for approval its plan for implementation of the CJA to the Judicial Council of the circuit. 18 U.S.C. § 3006(a). We therefore refer the study as to alleged insufficiency of participation of the bar in the panels of the CJA to the district courts and the Judicial Council. (J.A. 65-66) (emphasis added).

The court thus recognized that the plan in effect at the time this matter arose was deficient and required study and revision.

Snyder, upon receipt of the opinion of the Eighth Circuit suspending him, prepared a petition for rehearing en banc (J.A. 70-82). The petition for rehearing was based on the following grounds:

1. There had been a denial of due process;
2. There had been a denial of First Amendment rights;
3. There was a failure by Judge Lay to disqualify himself pursuant to 28 U.S.C. § 455.

The petition contained as exhibits an affidavit of Monteith (J.A. 82-83), the recipient of the letter and an affidavit of Judge Van Sickle (J.A. 83-84). The petition further contained a resolution of Snyder's local Burleigh County Bar Association (J.A. 84-87). The affidavits of Monteith and Judge Van Sickle indicate that they were not bothered by the October 6th letter and the content of the resolution from the Bar Association outlines in part the insufficiency of the CJA plan in North Dakota and further points out Snyder's service in cases involving indigents.

The Eighth Circuit denied the petition for rehearing (J.A. 88-95). The opinion makes it clear that the reason for the suspension is the October 6th letter:

> No apology for the October 6th letter was made. Thereafter on February 24, 1984, Chief Judge Lay wrote to Mr. Snyder giving him another opportunity to apologize. (J.A. 91).

The court stated that Judge Lay was not disqualified pursuant to 28 U.S.C. § 455 from serving on the panel

and summarily dealt with the due process allegation raised by Snyder stating:

> It is abundantly clear from the record that Snyder had notice that his disrespectful letter could be a basis for discipline. Snyder was given at least three opportunities to apologize for the letter and declined to do so. (J.A. 93).

Nothing is said in the opinion about the fact that the Order to Show Cause had absolutely no mention of the letter of October 6th, and that the request for the apology which arose during the hearing before the court and followed in the exchange of letters between Snyder and Judge Lay, was not the basis of the Show Cause Order in the first instance. Therefore Snyder was denied due process.

In dealing with Snyder's First Amendment issues, the court again concluded that the October 6th letter was disrespectful and further concluded that disrespectful remarks do not fall within the ambit of protected speech. Again, the court makes it clear that the reason for the suspension is the content of the October 6th letter:

> However, because of Snyder's past cooperation with the district court and serving on pro bono matters, because of his now professed willingness to continue to do so and to comply with the CJA guidelines, and because of the alleged misunderstanding as to the reasons for his suspension—*we conditionally vacate the panel's order of suspension and provide an additional ten days from the date of this letter for Attorney Snyder to provide a sincere letter of apology to this court for the disrespectful comments directed to the court in his letter of October 6, 1983,* sent to Judge Van Sickle's secretary. The clerk is directed that if Snyder fails to comply with this request our original order of suspension will be reinstated with the six months suspension to run from the date of the original order. (J.A. 94-95) (emphasis added).

It is clear from the court's opinion that the court recognized that Snyder had satisfied the issues raised in its Order to Show Cause and further it clearly enunciates the fact that the suspension was ordered because of Snyder's failure to apologize for the content of the October 6th letter.

SUMMARY OF ARGUMENT

The first fundamental issue in this case is whether the Eighth Circuit denied Snyder his First Amendment right to free expression by suspending him from the practice of law in the federal courts in the Eighth Circuit because of the content of the October 6, 1983, letter to Monteith and his refusal to apologize for the content of that letter.

Snyder contends that the First Amendment provisions are applicable to attorneys and although the First Amendment rights are not absolute (*see e.g. Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 462 (1978)) they may not be curtailed unless there is a substantial countervailing interest. *In re R.M.J.,* 455 U.S. 191, 203-04 (1982).

It is Snyder's further contention that an appropriate standard for evaluating the content of the letter is the "clear and present danger standard". This Court has had occasion to address the issue of criticism of the judicial system and the judiciary in various cases involving citizens and the press including *Bridges v. California,* 314 U.S. 252, 268-72 (1941), *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978) and others. Those cases generally hold that restrictions on criticism of the judicial system must be justified in terms of some substantive evil which they are designed to avert and that the interest protected by the regulation must be substantial. Snyder contends that the proper application of the clear and present danger standard as set forth in *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1978):

> Requires the court to make its own inquiry into the imminence and magnitude of the dangers said to flow from the particular utterance and then balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.

Snyder further contends that attorney criticism of the judicial system is an important and substantial right in that attorneys have special knowledge of the judicial system and are in a special position to use that knowledge to improve the system and correct its mistakes.

The Eighth Circuit has attempted to apply a standard which prohibits all "disrespectful" comments and as such the standard is an unconstitutional restriction of an attorney's right to free speech.

Snyder further contends that the comments in the October 6th letter do not in any way threaten the administration of justice and certainly do not constitute an obstruction of justice. Attorney misconduct constituting an obstruction of justice must consist of fraudulent, intentional, and improper motive misconduct and such conduct must be shown or sustained by clear and convincing proof.

The letter that is the basis for the suspension was a private letter directed to a secretary to a federal judge and the letter was not released to the media and did not become public until the Eighth Circuit issued to Order to Show Cause. It is important to note the functions being per-

formed which Snyder was critical of were administrative functions, not judicial functions, and a more strict standard regarding entitlement to free speech must be employed in situations where the remarks involved do not involve a pending judicial action.

The Eighth Circuit has relied upon Rule 46, Fed.R. App.P., as a basis for administering this discipline. Snyder contends that the provisions of Rule 46 are unconstitutionally overbroad and vague as applied to the facts of this case.

The second fundamental issue in this case is denial to Snyder of due process. Snyder has been denied due process in presenting his fundamental First Amendment rights in this case. The Order to Show Cause issued by the Eighth Circuit did not mention the October 6th letter, thus Snyder did not raise any First Amendment rights or arguments in his return to the Order to Show Cause and only after the hearing commenced before the Eighth Circuit panel did the content of the October 6th letter become an issue. He has thus not been afforded:

1. Proper notice of the reasons for the proposed suspension from practice;
2. An opportunity to be heard on the specific charge that his letter was disrespectful, and that its contents would justify suspension of his privileges to practice law; and
3. There was no hearing afforded or provided with respect to the assertion that the October 6, 1983, letter would be a basis for suspension of his privileges to practice.

Accordingly, Snyder's position is that the action taken by the Eighth Circuit is in violation of his First Amend-

ment rights and that the method which the Eighth Circuit used in suspending him from practice denied him due process.

ARGUMENT

I. The Suspension Of Petitioner By The Eighth Circuit Court Of Appeals Constitutes A Denial Of His First Amendment Right To Free Expression.

Snyder was suspended from the practice of law in the federal courts by the Eighth Circuit because he refused to retract statements made in a letter dated October 6, 1983, to the secretary of Judge Van Sickle. The Eighth Circuit deemed Snyder's remarks to be disrespectful to the Court. *In re Snyder*, 734 F.2d 334, 337, 343 (8th Cir. 1984) (J.A. 61-93). The substance of Snyder's letter reflected his frustration with the paperwork compliance required to receive reimbursement for services rendered pursuant to the Criminal Justice Act, 18 U.S.C. §3006A (1982). It is clear that Snyder was not suspended for his refusal to continue to serve on the Criminal Justice Act Panel.[1] It is equally clear that he was not suspended for his failure to forward the proper support for his request for fees. That failure was properly resolved by the Court in its refusal to pay him for the unsubstantiated and undocumented amounts.[2] Snyder was suspended because of the

1. *Snyder*, 734 F.2d at 339 (J.A. 65). Judge Lay, in the decision of the three judge panel, recognized that certain of Snyder's criticism had merit. *Snyder*, at 339 (J.A. 64-65).

2. *Id.* at 336 n.3 (J.A. 57).

"disrespectful" nature of his remarks and because of his refusal to apologize for them.[3] This case involves pure speech.

While the sanction imposed upon Snyder is unambiguous, the Eighth Circuit's rationale for that sanction is not readily apparent. Certainly the Eighth Circuit was offended by the remarks contained in the letter. The offense taken by the court was compounded by Snyder's refusal to apologize. While that may explain the sanction, it cannot justify it. The Eighth Circuit appears to believe that an attorney's refusal to publicly display respect for the court as a "legal institution" threatens the very survival of the rule of law. *Snyder,* at 337 (J.A. 60). Those attorneys who make "disrespectful" statements about the judicial branch of government demonstrate that they are "not presently fit to practice law in the federal courts." *Id.* (J.A. 60). In the Court's view, "[i]t is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech." *Id.* at 343 (J.A. 93).

Such a view not only does not comport with the standards previously enunciated by this Court, but is also directly contrary to an unbroken line of cases holding that a restriction on a citizen's right to free expression can survive only when such expression presents a "clear and present danger" of the imminent occurrence of some substantive evil within the power of government to prevent.

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3. See Letter from Judge Lay to Snyder (Feb. 24, 1984) (J.A. 52-53); *Snyder,* 734 F.2d 334, 337, 342 (8th Cir. 1984) (J.A. 59, 91-92).

The Court also refers to Fed. R. App. P. 46(c).[4] In support of the Rule 46 sanction, the court refers to DR 1-102(A) (5) of the Model Code of Professional Responsibility, which prohibits attorneys from engaging in conduct which is "prejudicial to the administration of justice." *Id.* However, the Eighth Circuit has not indicated that it has adopted the provisions of the Model Code of Professional Responsibility as a limiting factor to Rule 46. More importantly, the court does not explain how Snyder's letter or his refusal to apologize are "prejudicial to the administration of justice."

A. The First Amendment is Applicable to Attorneys.

Lawyers have been provided First Amendment protection in several contexts. In 1963, this Court invalidated a Virginia anti-solicitation law, holding that the activities of the N.A.A.C.P. "are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession . . . ." *N.A.A.C.P. v. Button,* 371 U.S. 415, 428-29 (1963). In *Bates v. State Bar,* 433 U.S. 350, 379 (1977), it was held that lawyer advertising is a form of commercial speech protected by the First Amendment. *See also In re R.M.J.,* 455 U.S. 191 (1982). It is therefore clear that lawyers are protected by the First Amendment, and that professional

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4. Rule 46(c) provides: **"Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."**

rules of ethical conduct are subject to constitutional constraints.

Although an attorney's First Amendment rights are not absolute (*e.g., Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 462 (1978)),[5] those rights may not be curtailed unless there is a substantial countervailing interest. *R.M.J.,* 455 U.S. at 203, *citing, Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 563-64 (1980). This framework has been developed as a necessary compromise between the role of an attorney in our society and the important values supported and derived from the First Amendment.

B. The "Clear and Present Danger Standard" is the Appropriate Test for Evaluating Petitioner's Remarks.

The Supreme Court has had cause to address criticism by citizens and the press of both the judicial system and the judiciary on several occasions. *Bridges v. California,* 314 U.S. 252, 268-72 (1941); *Pennekamp v. State of Florida,* 328 U.S. 331, 346-50 (1946); *Craig v. Harney,* 331 U.S. 367, 373, 376 (1947); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843 (1978). These cases hold restrictions on criticism of the judicial system or the judiciary must be justified "in terms of some serious substantive evil which they are designed to avert." *Bridges,* 314 U.S. at 270. The interest protected by the regulation must be substantial, *Button,* 371 U.S. at 444,[6] and freedom of

5. *Cf. Spevack v. Klein,* 385 U.S. 511, 514 (1967) (self-incrimination clause of the 5th amendment extends to lawyers even in disciplinary proceedings).

6. *See also Elrod v. Burns,* 427 U.S. 347, 362 (1976); *quoting, Buckley v. Valeo,* 424 U.S. 1, 64 (1976).

speech should not be impaired through a subsequent sanction "unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig,* 331 U.S. at 373. It is therefore essential that the perceived threat is one of substance. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 508 (1969); *see also Cohen v. California,* 403 U.S. 15, 23 (1971).

Originally the clear and present danger test focused exclusively on the evil to be avoided and the probability of that evil being brought about by the words used.[7] Over the years, the Supreme Court has modified the application of the "clear and present danger" test by allowing First Amendment interests to be balanced against other compelling governmental interests. This Court recently stated in *Landmark,* 435 U.S. 829 (1978), that the proper application of the clear and present danger test "requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Id.* at 842-43. The test in *Landmark* reconciles the views expressed by Justice Frankfurter in his dissents in *Bridges* and *Craig* with the concerns of the majority in those cases.

7. *See Schenck v. United States,* 249 U.S. 47, 52 (1918): The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. *Id.* at 52.

The *Landmark* balancing formulation of the clear and present danger standard should also be applied to attorney speech not involving a pending case, not creating an obstruction of justice, and not directly impugning the integrity of a judge exercising his judicial function. This standard has been applied to several aspects of attorney speech and speech related conduct that impinges on the First Amendment.[8] The same type of analysis should be applied to this case, especially since Snyder's remarks constitute pure speech (as opposed to commercial speech or speech plus conduct) and are the essence of political expression.[9]

Within the confines of the clear and present danger test, attorney criticism of the judicial system furthers an important and recognized public interest. Lawyers have a special knowledge of the judicial system and are in a special position to use that knowledge to improve the system and correct its mistakes.

> Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criti-

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8. *See Button,* 371 U.S. at 444 (activities fall within First Amendment protection; state failed to advance any substantial regulatory interest); *Bates,* 433 U.S. at 381 (Court not persuaded that the proffered reasons justify suppression of all attorney advertising); *In re Primus,* 436 U.S. 412, 436 (1978) (where First Amendment implicated, a very distant possibility of harm cannot justify proscription of the activity); *Ohralik,* 436 U.S. at 459 (while entitled to some constitutional protection, in-person solicitation is subject to regulation due to the particularly strong state interests); *R.M.J.,* 455 U.S. at 203 (the state must assert a substantial interest and the interference with attorney speech must be in proportion to the interest served).

9. An attorney's critique of the judicial system or a court is conduct that implicates interests of free expression. *Cf. Primus,* 436 U.S. at 426, 426-32. In the context of political expression, a governing body or court must regulate with significantly greater precision. *Id.* at 437-38.

> cism. Indeed, they are under a special responsibility to exercise fearlessness in doing so.

In re Sawyer, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting); *see also* Model Code of Professional Responsibility EC 8-1 (1983).

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964).

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges, 314 U.S. at 270-71 (footnote deleted). "[T]he law gives '[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.'" *Landmark,* 435 U.S. at 839 *citing, Bridges v. California,* 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting). "[J]udges are supposed to be [persons] of fortitude, able to thrive in a hardy climate." *Craig,* 331 U.S. at 376. A private citizen does not and must not surrender the right to freedom of expression when he or she becomes a licensed attorney. *See Sawyer,* 360 U.S. 622 (1959); *Polk v. State Bar,* 374 F. Supp. 784, 788 (N.D. Tex. 1974).

C. The Standard Applied by the Eighth Circuit to Petitioner's Remarks is Inconsistent with the First Amendment.

The Eighth Circuit's creation of a standard prohibiting all disrespectful remarks by an attorney has no sup-

port in the law; nor should it be given any. As formulated, the Eighth Circuit standard unnecessarily restricts attorneys' protected speech, both directly and indirectly. The lower court failed to apply the clear and present danger test and it substituted no comparable criteria. It failed to particularize the evil to be avoided and it delineated no feature of public interest to be served. Mere disrespect towards the judicial system or a court does not, in and of itself, constitute a substantial evil worthy of total prohibition.[10] More importantly, an absolute prohibition of all disrespectful remarks would create a chilling effect upon attorneys because of the inherent vagueness of the term "disrespectful."[11] The threat of punishment breeds fear, and fear engenders self-censorship. *Cf. Schaefer v. United States,* 251 U.S. 466, 493-94 (1920) (Brandeis, J., dissenting).

In order to give substance to the Eighth Circuit standard, it is necessary for the court to find that disrespectful speech by a lawyer—in all possible circumstances—is so abhorrent as to warrant no protection from the First Amendment. Such a finding totally negates the recognized value of attorney criticism of the system and the "special

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10. Petitioner sincerely believes that his comments were not disrespectful. Judge Van Sickle, who forwarded Snyder's letter to Judge Lay, also did not consider the letter to be disrespectful. *See* Rieger, *Lawyer's Criticism of Judges: Is Freedom of Speech a Figure of Speech,* 2 Const. Commentary 69, 71 n.6 (1985). *See infra,* Part II.

11. *See infra,* Part II.

responsibility" that lawyers have "to exercise fearlessness in doing so."[12]

According to the Eighth Circuit, the evil to be prevented is nothing less than the collapse of the legal system itself:

> [Snyder's] refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts. All courts depend upon the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive.

Snyder, 734 F.2d at 337 (footnote omitted) (J.A. 60). This extreme view has been repeatedly rejected by this Court. *See, e.g., Bridges; Landmark.* Surely our system of law is not so fragile that it cannot withstand occasional disrespectful remarks that may be advanced by attorneys.

The belief that allowing attorneys to make disrespectful remarks will cause the downfall of our system of justice is nothing more than an "undifferentiated fear" which does not even rise to the level of "a very distant possibility of harm." *Cf. Primus,* 436 U.S. at 436 ("A 'very distant possibility of harm' . . . cannot justify proscription of the activity of [the attorney] revealed by this record.").

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12. *Sawyer,* 360 U.S. at 669 (Frankfurter, J., dissenting). This does not mean that petitioner takes the opposite extreme and advocates that all forms of disrespectful remarks made by a lawyer should be protected by the First Amendment. As discussed, *infra,* petitioner does not assert that conduct which is directed at a pending case and which tends to inhibit the fair and impartial administration of justice or conduct which actually obstructs justice should receive First Amendment protection.

Neither is the Eighth Circuit's view on the scope of First Amendment rights of attorneys supported by this Court's opinion in *Sawyer,* 360 U.S. 622 (1959). The Circuit cites *Sawyer* at 646-47 (Stewart, J., concurring) for the proposition that "[i]t is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech." *Snyder,* 734 F.2d at 343 (J.A. 93). This is both a misstatement of the law and a misreading of *Sawyer.*

The term "officer of the court" does not have a literal meaning. *Cammer v. United States,* 350 U.S. 399, 405 (1956). A license to practice law does not turn a citizen into a vassel. The bar must be fearless and independent, not obsequious. This court has expressed its concern that the bar be independent, "that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar." *Konigsberg v. State Bar,* 353 U.S. 252, 273 (1957) (footnote deleted).

It is not "well settled" that disrespectful remarks by an attorney fall outside the protections of the First Amendment. This Court has had only one opportunity to address this issue. In the *Sawyer* decision, this Court explicitly declined to reach the First Amendment issue. *Sawyer,* 360 U.S. at 626-27. Instead, the Court held that the suspension of the lawyer for making comments to a public audience concerning a pending trial and the state of the law did not constitute an obstruction of justice and was not supported by the evidence. *Id.* at 635-36.

Contrary to the assertions made by the Eighth Circuit, *Sawyer* does not support the view that all disrespectful comments by attorneys fall outside "the ambit of protected speech." Certainly some judges would construe Sawyer's comments as disrespectful. And yet the

Sawyer Court, "against a backdrop of the claimed constitutional rights of an attorney to speak as freely as another citizen," refused to allow the suspension to stand. *Id.* at 640. Thus *Sawyer* may be read as supporting the converse of the Eighth Circuit's assertion: ***An absolute prohibition of all disrespectful remarks by an attorney cannot stand First Amendment scrutiny.***

In support of its construction of *Sawyer,* the Eighth Circuit quotes one sentence of Justice Stewart's concurrence: "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." (J.A. 93). On the surface—indeed, taken out of context—this statement seems to lend support to the Eighth Circuit's absolutist standard. It is necessary to place the statement in its original context to prevent misreading and misapplication:

> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. For example, I doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline.
>
> In the present case, if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial, this would be the kind of case to which the language of the dissenting opinion seems largely directed. But that was not the charge here, and it is not the ground upon which the petitioner has been disciplined.

Sawyer, 360 U.S. at 646-47 (footnote omitted). Taken in context, it is clear that Justice Stewart was concerned with the prospect of developing an absolute rule that supported *all* attorney speech. He was rightfully concerned that the

First Amendment should not be used to foster—or protect—release by an attorney of confidential information. Nor did Justice Stewart believe that the First Amendment should be used to prevent discipline of an attorney who "attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial."

Given these particulars, and given the weighty countervailing interests of the attorney-client relationship and the constitutional right to a fair trial, Justice Stewart was merely stating his unwillingness to extend the protections of the First Amendment to an attorney for "proven unethical conduct." *See id.* at 646. Obviously Justice Stewart did not believe that Sawyer's remarks rose to a level of proven unethical conduct, or he would not have concurred in the result. Nor is there any indication in his concurrence that disrespectful comments "do not fall within the ambit of protected speech."

Not only does Justice Stewart's concurrence fail to support the Eighth Circuit's absolute prohibition of "disrespectful remarks," but there is an even stronger likelihood that the Justices who dissented in *Sawyer* would not approve of the Eighth Circuit's reasoning.

Justice Frankfurter's dissent is grounded on the fact that Sawyer's comments related to a pending trial in which she was actively participating, that the comments threatened the fair and impartial administration of justice, and impugned the integrity of the presiding judge. Especially telling is Justice Frankfurter's remark concerning an attorney's right to critique the courts and their administration of justice: "Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise

it to castigate courts and their administration of justice." *Id.* at 666.[13] Justice Frankfurter was concerned that a proper balance be struck between what he viewed as important First Amendment freedoms and the even more important constitutional right of a citizen to the fair, impartial, and uninfluenced administration of justice. *Cf. Pennekamp,* 328 U.S. at 353 (Frankfurter, J., concurring). These concerns with the balancing of constitutional interests were given majority expression in *Landmark.* Thus even the Justices who dissented in *Sawyer* would reject the absolute rule that "disrespectful remarks by an officer of the court do not fall within the ambit of protected speech."[14]

D. Petitioner's Comments Do Not Threaten The Administration of Justice and Do Not Constitute an Obstruction of Justice.

A lawyer's criticism of the judicial system or the judiciary cannot be grounds for disciplinary action where the criticism does not involve a pending action in which the attorney is a participant or does not directly impugn the integrity of a particular court or judge acting in a

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13. The same thought was reiterated at a later point in Justice Frankfurter's dissent:

> Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so.

Sawyer, 360 U.S. at 669.

14. Snyder's remarks should also deserve protection through the plain application of *Sawyer.* Unlike *Sawyer,* Snyder's remarks do not involve a pending action and do not, even indirectly, impugn the integrity of the Eighth Circuit or Chief Judge Lay. And when one compares Sawyer's vituperative comments with Snyder's, it is clear that Snyder's remarks are more worthy of protection than those made by Sawyer.

judicial capacity, unless the remarks actually obstruct justice or create a clear and present danger to the administration of justice. Whether or not sufficient circumstances exist to restrict speech depends upon the specific facts of each case. *Landmark,* 435 U.S. at 842-44.

Several factors should be considered in the determination of whether there exists a clear and present danger to the administration of justice. When was the statement made? Was the statement directed at a pending judicial proceeding? Did the statement impugn the integrity of a judge's conduct of a pending judicial proceeding, or was the statement intended to intimidate the judge in the performance of his judicial function? Was the attorney making the statement directly involved in the proceeding about which the comment was made? Was the statement publicized? Did the statement contain obscene or otherwise patently offensive language? Did the statement impact the interests of any litigant? How vulnerable to outside interference or prejudice was the proceeding at which the statement was directed?[15]

Attorney misconduct which constitutes an obstruction of justice "must be sustained by clear and convincing proof, the misconduct must be fraudulent, intentional, and

15. In *In re Hinds,* 90 N.J. 604, 622-23, 449 A.2d 483, 493 (1982), the New Jersey Supreme Court utilized similar factors in assessing the standard for imposing discipline on an attorney for public statements made about a pending criminal case and the presiding judge in that case. The *Hinds* court authorized the use of the "reasonable likelihood" standard in applying the doctrine of clear and present danger to public statements made in an ongoing criminal trial. However, the court clearly indicated its preference for the clear and present danger standard as enunciated in *Landmark,* when examining conduct sought to be restricted by DR 1-102(A)(5) of the Code of Professional Responsibility. *Hinds,* 90 N.J. at 631-34, 449 A.2d at 497-99.

the result of improper motives." *In re Ryder,* 263 F. Supp. 360, 361 (E.D. Va.) *aff'd,* 381 F.2d 713 (4th Cir. 1967), *citing, In re Fisher,* 179 F.2d 361, 369 (7th Cir.), *cert. denied sub nom. Kerner v. Fisher,* 340 U.S. 825 (1950).[16] The fact of obstruction must "clearly be shown." *In re McConnell,* 370 U.S. 230, 234 (1962). In order to find an obstruction of justice the attorney's conduct must be "sufficiently disruptive" of the court's business, and must "in some way create an obstruction which blocks the judge in the performance of his judicial duty." *Id.* at 235-36. As was stated in *In re Dellinger,* 461 F.2d 389, 400 (7th Cir. 1972),

> Mere disrespect or insult cannot be punished where it does not involve an actual and material obstruction. This is particularly true with respect to attorneys where the "heat of a courtroom debate" may prompt statements which are ill-considered and might later be regretted. [Cite.] Substantial freedom of expression should be tolerated in this area since "[j]udges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney,* 331 U.S. 367, 376 [1947]. However, . . ., although it is elusive, there is a line beyond which disrespect becomes obstruction. When the remarks create an imminent prejudice to a fair and dispassionate proceeding, that line has been crossed.

As demonstrated by *Dellinger,* the test for disrespectfulness in the realm of pending actions is a strict one; an even

16. Moreover, the courts have the long-standing duty to foster the rights and independence of the bar by a careful exercise of their power to sanction attorneys:

> The power [to remove an attorney] is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

Ex parte Secombe, 60 U.S. (19 How.) 9, 13 (1856).

stricter standard should be employed in situations where the remarks do not involve a pending action[17] or impugn the integrity of a judge.

Neither Snyder's remarks nor his refusal to apologize for them justify his suspension. His remarks constitute speech deserving of constitutional protection.

The letter that is used as the basis for Snyder's suspension consists of five paragraphs. The first paragraph serves as an introduction, the last as a closing. In the second paragraph, Snyder states that he is "appalled by the amount of money which the federal court pays for indigent criminal work." (J.A. 14). In the third paragraph, Snyder states that:

> not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it. (J.A. 14-15).

In the fourth paragraph, Snyder states that he is "extremely disgusted by the treatment of the Eighth Circuit. . . ." (J.A. 15).

Snyder's comments do not concern a pending case. Nor do they impugn the integrity of the Eighth Circuit or

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17. As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, *see In re Sawyer*, 360 U.S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings.

Nebraska Press Association v. Stuart, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring); *see also Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *United States v. Tijerina*, 412 F.2d 661, 667 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

any of its judges. Certainly no judge able to thrive in a hardy climate would be intimidated by Snyder's remarks. Snyder's remarks were not directed to a court acting in a judicial capacity;[18] rather, his letter is more properly viewed as intra-institutional criticism of the ministerial provisions of the Criminal Justice Act. Further, Snyder's comments followed two earler efforts to provide requested documentation. Finally, his letter was a private communication and only became public after the Eighth Circuit issued its Order to Show Cause.[19] It was not made in an open forum and no attempt was made to hold the court system open to ridicule. Thus, examining the circumstances of this case, it is clear that Snyder's comments did not and do not create a clear and present danger to the administration of justice.

Nor do Snyder's remarks in any way obstruct the administration of justice. The Criminal Justice Act was administered to its inexorable conclusion notwithstanding Snyder's venting of his frustration. His failure to comply with the Act's guidelines as to the breakdown of his hours and the submission of supporting material with his bill was resolved by the court's denial of excess attorney fees and unitemized expenses. The administration of justice was not obstructed.

Snyder's remarks, even if harsh, concern a substantive evaluation of the Criminal Justice Act; its former

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18. *See Stump v. Sparkman*, 435 U.S. 349, 362 (1978); *Ex parte Virginia*, 100 U.S. 339, 348 (1879).

19. Except for the Eighth Circuit's unfortunate overreaction, no one outside of the court would have known about the letter. Furthermore, even if Snyder had published his letter on the front page of the *New York Times*, no imminent threat to the administration of justice would have existed.

Rieger, *supra* note 10 at 87.

standard of pay; the financial difficulty the Act imposes upon attorneys; the administrative burden it imposes; and the manner in which the Eighth Circuit administered the Act. The words may be curt, but they are not offensive or disrespectful. *See* Rieger, *supra* note 10, at 71 n. 6.

Snyder's remarks concern an important public issue. As such, the letter is "more than self-expression; it is the essence of self-government." *Garrison,* 379 U.S. at 75. If words such as these do not find constitutional protection, the chilling effect upon attorneys will be both broad and deep.[20] Attorney's opinions will be only as safe as the sensitive nature of any given judge on any given day.

II. Rule 46, As Applied To Prohibit An Attorney's "Disrespectful" Remarks, Is Unconstitutionally Overbroad and Vague.

Rule 46, Fed. R. App. P. has survived constitutional attack on grounds of overbredth and vagueness in the lower courts by an informal incorporation of provisions of the Model Code of Professional Responsibility. *See In re Bithoney,* 486 F.2d 319, 323-25 (1st Cir. 1973); *United States v. Hearst,* 638 F.2d 1190, 1197 (9th Cir. 1980), *cert. denied,* 451 U.S. 938 (1981); *see also Halleck v. Berliner,* 427 F.Supp. 1225, 1239-40 (D.D.C. 1977). In the present case the Eighth Circuit has apparently chosen to infuse the substance of DR 1-102 (A) (5) into Rule 46(c), Fed. R.

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20. For an overview of other instances of attorney discipline for comments directed at the judicial system or the judiciary, see Riger, *supra* note 10, at 69-70.

App. P. However, as applied to the facts of this case, Rule 46(c) is unconstitutionally overbroad and vague.[21]

In *Procunier v. Martinez,* 416 U.S. 396 (1974), this Court established a two-part test to determine when restrictions on First Amendment freedoms were warranted:

> First, the regulation . . . must further an important or substantial governmental interest unrelated to the suppression of the expression . . . second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Id. at 413; *see also United States v. Grace,* 461 U.S. 171, 177 (1983); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 212 (1975). Where a court seeks to limit an attorney's First Amendment rights, sanctions issued pursuant to Rule 46(c) must be limited to instances involving substantial countervailing interest, such as conduct which results in a serious detriment to a client (e.g. release of confidential information), conduct with a substantial likelihood of producing future harm to clients (e.g. fraud or misrepresentation), or conduct actually amounting to an obstruction of justice (e.g. statements which prevent a fair trial).

Rule 46(c) fails to provide an attorney with sufficient information as to what otherwise constitutionally protected conduct could result in disciplinary action. The Rule provides "an insufficient nexus with any of the public interests that may be thought to undergird [it]."

---

21. While it may be appropriate for the Court to declare Rule 46 void an its face on grounds of vagueness or overbredth, or to merely declare Snyder's remarks as protected by the First Amendment, and while such a decision would benefit petitioner personally, petitioner urges the Court to establish guidelines for attorney speech by applying the clear and pesent danger standard, or, in the alternative, limiting Rule 46 by a narrow construction. Given the present state of the law, guidance to the lower federal courts and state courts is clearly necessary. See Rieger, *supra* note 10, at 69-70.

Grace, 461 U.S. at 181. Certainly it contains no ascertainable standard by which an attorney may determine in advance if his or her speech will subject him or her to disciplinary sanctions. *Cf. Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971); *Hynes v. Mayor & Council of the Borough of Oradell,* 425 U.S. 610, 620-22 (1976). The standard of "disrespectful" has no content. The values it imparts are largely subjective and inevitably vary with the personality of the listener, *cf. Thomas v. Collins,* 323 U.S. 516, 534, 535 (1945), thus negating the possibility of "even-handed discipline" of attorneys. *Sawyer,* 360 U.S. at 646 (Stewart, J., concurring).[22]

More importantly, the type of conduct prohibited by the Eighth Circuit standard does not fall within the core concerns of Rule 46. *Cf. Parker v. Levy,* 417 U.S. 733, 754-55 (1974). The phrase "conduct unbecoming an officer of the court" certainly brings within its confines illegal conduct, misrepresentations, serious detriment to a client, and release of confidential information, to name but a few. It is not so clear, however, that the rule was intended to include all alleged disrespectful remarks made by an attorney.

Unlike Article 133 of the Uniform Code of Military Justice, Rule 46 does not directly relate to a system of rules or any limiting constructions. *Cf. Parker,* 417 U.S. at 752-54. Nor is Snyder's conduct "clearly prohibited" by the rule. *Cf. id.* at 755. Indeed, the Model Code of Professional Responsibility makes no mention and con-

---

22. As Justice Black stated in *Konigsberg:*

> [W]e recognize the importance of leaving states free to select their own bars, but it is equally important that the state not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association.

Konigsberg, 353 U.S. at 273.

tains no prohibition of disrespectful comments directed to a judge or court.

As discussed in Part I. D., *supra,* Snyder's comments did not concern a pending case, did not constitute a detriment to a client, and did not obstruct justice. Rule 46(c) is overbroad as applied to this case because Snyder's alleged "disrespectful" comments are protected by the First Amendment due to the lack of a substantial countervailing interest. The rule is vague as applied because, to paraphrase Justice Harlan, one person's disrespectful comments are another person's lyric.[23]

III. The Order To Show Cause Hearing Before The Eighth Circuit Court Of Appeals Violated Petitioner's Due Process Rights.

A. Petitioner Did Not Receive Notice That Remarks Made To Judicial Secretary Would Be Considered Contumacious Conduct Of Significant Character So As To Justify Suspension.

The invited comments of Snyder contained within his October 6, 1983, letter to a judicial secretary formulate the basis of the free speech issue heretofore presented. If one assumes the applicability of the First Amendment to the comments of Snyder, a more subtle question arises as to whether Snyder was given a reasonable opportunity to raise the issue and have the merits of the argument fairly weighed by the Eighth Circuit at the time of the hearing on the Order to Show Cause.

It is important to note that Snyder's frank comments on the administration of the Criminal Justice Act in North Dakota were the basis of suspension; however, they were never cited as a potential basis in the Order to Show Cause issued by Judge Lay.

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23. *Cohen* v. *California,* 403 U.S. 15, 25 (1971).

The December 22, 1983, Order referred to (1) Snyder's request that his name be removed from the list of attorneys willing to represent indigents in criminal cases, and (2) his refusal "to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorneys' fees." According to the Eighth Circuit, these two matters justified a show cause hearing to consider Snyder's suspension. (J.A. 21-23). The Order did not refer to any alleged contumacious comments by Snyder, nor did it suggest that the dignity of the court system had been threatened or scarred by Snyder's letter to the court secretary.

The only indication that Snyder was refusing to serve on the Criminal Justice Act panel came from language within his October 6, 1983, letter wherein he "instructed" the secretary to remove his name from the list of attorneys willing to accept criminal indigency work (J.A. 14-15). With respect to documentation of vouchers and applicable Criminal Justice Act guidelines in compiling and transmitting the documentation, Snyder indicated to the secretary that he would not submit further materials and suggested she could "take it or leave it."

The October 6, 1983, letter is the only document wherein Snyder commented on his willingness to serve and on the documentation requirements under the Criminal Justice Act plan. That part of the letter, although serving as the basis for the issuance of the Order to Show Cause, did not formulate the basis for suspension. Snyder was not directed to respond to an Order to Show Cause for suspension predicated on what is interpreted now as contumacious conduct in refusing to "offer a retraction and sincere apology for his disrespectful remarks." *Snyder*, 734 F.2d at 336 (J.A. 58).

In its decision of April 13, 1984, the panel of the Eighth Circuit cited the language which it apparently considered to be contumacious and which it used to suspend Snyder from practice:

> Snyder then sent to the district judge's secretary a letter, dated October 6, "for the purpose of responding to" the chief judge's request. Snyder stated that he was "appalled" at the small amount paid to attorneys for indigent criminal defense work. He indicated his displeasure at the "extreme gymnastics" required to receive "puny amounts." He then stated to the court: "We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it." Snyder concluded his letter by stating that he was "extremely disgusted" by the treatment of him by the Eighth Circuit, that he wished to be taken off the list of attorneys willing to accept appointment in indigent cases, and that he had "simply had it."

Snyder, 734 F.2d at 336 (J.A. 56-57).

The Order to Show Cause did not cite or refer to this language as a basis for possible suspension. The Order did not suggest that Snyder should be prepared to respond to assertions that his language, which included phrases such as "puny amounts" and "extreme gymnastics," would be questioned. And it was not suggested in any way that "sincere apologies" had been requested and refused, thus forming an additional basis for the hearing on the Order to Show Cause.

The initial request for an apology from Snyder came not in some legal pleading directed to Snyder but in a letter from Judge Lay to Judge Van Sickle on November 15, 1983 (J.A. 18-19). Snyder was not a party to this correspondence and the letter could not be considered as notice to Snyder that in some future Order to Show Cause hearing the issue of refusal of an apology would result in suspension. Judge Lay's letter was drafted in his administrative capacity and did not cite specific language from

Snyder's letter which constituted a threat to the court so grievious so as to justify suspension. Judge Lay's letter suggested only the potential of issuing an Order to Show Cause and it was not meant to be nor could it be construed as notice of the defined reasons for possible suspension even if Snyder had received it (J.A. 18-19).

The Return to the Order to Show Cause (J.A. 23-31) did not address the issue of free speech which now forms the basis for this petition. To have done so would have been inappropriate in light of the specific language of the Order to Show Cause of December 22, 1983. The return instead concentrated on the fact that the Model Criminal Justice Act Plan, adopted in North Dakota and previously approved by the Eighth Circuit, did not mandate participation, a fact later recognized by the Eighth Circuit panel.

> Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan. However, his conditional agreement to serve in the future, if other attorneys who are competent to try cases are included on the panel, also has considerable merit. Under the Criminal Justice Act each district is required to submit for approval its plan for implementation of the CJA to the Judicial Council of the Circuit. 18 U.S.C. § 3006A(a). We therefore refer the study as to alleged insufficiency of participation of the bar in the panels of the CJA to the district courts and the Judicial Council.

Snyder, 734 F.2d at 339 (J.A. 65-66).

The Circuit suspended Snyder from practice not because he refused to participate on a panel of lawyers willing to serve indigent defendants and not because he refused to properly fill out a CJA voucher. He was suspended because the panel found his alleged disrespectful statements "contumacious conduct" for which Snyder refused to apologize. *Snyder,* 734 F.2d at 337 (J.A. 61).

Snyder was never given proper notice, opportunity for hearing, or a proper hearing on the allegation that his letter was contumacious or impeded the administration of the Criminal Justice Act in the Eighth Circuit or that it would be a basis for suspension. Snyder has thus been denied due process of law by the Eighth Circuit.

In *Mullane v. Central Hanover Bank and Trust Company,* 339 U.S. 306, 314 (1950), this Court observed:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections.

The notice must be of such a nature to reasonably convey the information (in this case the assertion that perceived disrespectful comments might rise to contumacious conduct justifying suspension) and must afford a reasonable time for a party to present his case and have the merits fairly judged. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

The Order to Show Cause was a disciplinary proceeding undertaken pursuant to Rule 46 of the Federal Rules of Appellate Procedure and with the express purpose of suspending a property right of a practicing attorney. As such, the due process clause of the Fifth Amendment was applicable to the hearing ordered by the Eighth Circuit. It required reasonable notice of the basis for depriving Snyder of his license to practice law in the federal courts.

Although this action dealt with a suspension from practice rather than a permanent disbarment, the rights involved in each proceeding are similar, if not identical. This Court has observed that disbarment designed to pro-

tect the public is a punishment or penalty imposed on the lawyer and the lawyer is accordingly entitled to procedural due process of law. *In Re Ruffalo,* 390 U.S. 544, 550 (1968). Fair notice of the charges is essential to the concept of due process. The purpose of the notice requirement is to apprise the affected individual and then permit adequate preparation for an impending hearing. *Memphis Light Gas & Water Division v. Craft,* 436 U.S. 1, 14 (1978).

The Order to Show Cause did not apprise Snyder of the eventual basis used to suspend him and as a result he could not and did not prepare a response to those allegations. The transcript of the hearing demonstrates the lack of preparation on the First Amendment issue and the understandable failure of Snyder to address the issue. The panel requested an apology for the "tone" of the letter during the February 1984 hearing never indicating to Snyder that suspension might well follow any refusal. Snyder twice pointed to the fact that an apology was not the reason he had been summoned before the court (J.A. 40-41).

At the hearing, Judge Lay stated precisely what it would take for Snyder to purge himself of the "concern of the Court."

> [A]ll it is is a simple statement that you will take pro bono assignments of the federal courts and that you will comply with the guidelines if you are asked to do so.

(J.A. 45).

In making that statement, the Eighth Circuit seemed to recognize the language of the Order to Show Cause. Something happened, however, as the hearing progressed and the true reason for the suspension became apparent in Judge Lay's final statement.

> Judge Lay: Just on the assumption that Mr. Snyder will exercise some judgment in this matter, and consult with you or someone like you. I want to make it clear to Mr. Snyder what it is the Court is allowing you ten days lapse here, a period for you to consider. One is, that, assuming there is a general requirement for all competent lawyers to do pro bono work, that you stand willing and ready to perform such work and will comply with the guidelines of the statute. *And secondly, to reconsider your position as Judge Arnold has requested concerning the tone of your letter of October 6.*

(J.A. 50) (Emphasis added). By the end of this hearing, the "tone" of the October 6 letter was now the issue, one which never was identified prior to that time.

The guarantees of due process call for a hearing appropriate to the nature of the case. *Mullane,* 339 U.S. at 313. Snyder was being asked to show cause why he should not be suspended from practice in the federal courts. He was entitled to know the reasons for the anticipated suspension and if it was to be the "tone" of his October 6, 1983, letter he was entitled to that notice.

Responding to a request for an apology during the hearing is not a reasonable opportunity to be heard on the issue of First Amendment rights. "The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'" *Parratt v. Taylor,* 451 U.S. 527, 540 (1981), quoting, *Armstrong,* 380 U.S. at 552.

The February 1984 hearing was not set to secure an apology. Snyder did not anticipate that the hearing would encompass the First Amendment issue and he had no reason to anticipate the issue based on the Order to Show

Cause. The fundamental purpose of the due process clause is to allow "the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

The First Amendment issue was never presented by Snyder and he did not have a meaningful opportunity to present his case regarding that issue. The matter was not fairly judged on its merits and Snyder was denied due process of law.

B. Petitioner Did Not Receive Impartiality From The Judicial Officer Who Both Questioned His Conduct And Who Headed The Panel Suspending Petitioner.

It was correspondence between a district court's secretary and a Circuit Court secretary which prompted Judge Lay's question of November 3, 1983, as to whether Snyder was "worthy of practicing law in the federal courts in any matter." (J.A. 15-18). The opinion of Judge Lay regarding lawyer participation under the Criminal Justice Act was set out in detail in the same letter. It was clear Judge Lay disapproved of the position taken by Snyder. He specifically directed Snyder's name be stricken from the appointment list and suggested the further discipline of suspension from all appearances. It is not without irony that the Eighth Circuit ultimately concluded Snyder's request that his name be removed from the appointment list was proper. The plan in North Dakota was not mandatory.

> Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compuliance with the plan.

Snyder, 734 F.2d at 339 (J.A. 65).

The inference of the November 3, 1983, letter was clear. Judge Lay had determined that Snyder deserved

to be suspended based solely on his request to have his name taken from the appointment rolls. Judge Lay prejudged the matter to the point of indicating what he thought was an appropriate penalty.

Judge Lay not only issued the Order to Show Cause under his signature, and after rejecting a request to recuse himself, he chaired the panel of the Eighth Circuit which heard the Order to Show Cause matter and drafted the opinion of the panel. *In re Snyder*, 734 F.2d 334 (8th Cir. 1984) (J.A. 55-69).[24]

Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). To perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Judge Lay should have recused himself from consideration of this matter based upon the provisions of 28 U.S.C. § 455, which states in pertinent part as follows:

> Disqualification of justice, judge or magistrate:
>
> (a) Any justice, judge, . . . of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned.

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24. Compare the procedure employed by the Eighth Circuit in acting both as accuser and trier of fact with *Office of Disciplinary Counsel v. Pileggi*, 570 F.2d 480, 481 (3d Cir. 1978), and *In re Chandler*, 450 F.2d 813, 814 (9th Cir. 1971), in which the Third and Ninth Circuits appointed independent special masters who conducted proceedings and made findings, which were then reviewed by the respective courts of appeals. *See also In re Grimes*, 364 F.2d 654, 655 (10th Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967).

Rieger, *supra* note 10, at 74 n.16.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

The language of the statute is also a part of Canon 3C of the *Code of Judicial Conduct,* which states in pertinent part as follows:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, included but not limited to instances where:

a. He has a personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding;

The initial involvement of Judge Lay in this matter before the issuance of the Order to Show Cause falls within the provisions of 28 U.S.C. § 455 in that he had personal knowledge of the facts concerning the proceedings.

> To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance towards views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

Rochin v. California, 342 U.S. 165, 171-72 (1952).

It is respectfully submitted that Snyder was denied due process of law as guaranteed by the United States Constitution when the Chief Judge sat on the panel after there had been a request for his recusal and after he had indicated in his letter that he questioned whether Snyder

was "worthy of practicing law in the federal courts on any matter."

—o—

CONCLUSION

Upon all of the grounds urged herein, separately and together, the judgment of the lower court should be reversed and vacated.

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No. 84-310

(7)

In The

Supreme Court of the United States

October Term, 1984

In the Matter of:
Attorney Robert J. Snyder.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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Attorneys for Petitioner

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CJA Form 20 (Rev. 8/82)

APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

1. COURT
☐ Magistrate ☒ District ☐ Appeals ☐ Other _____

2. VOUCHER NO.
746874

3. FOR (DISTRICT OR CIRCUIT)
NORTH DAKOTA

4. AT (CITY/STATE)
BISMARCK

5. LOCATION CODE
34101

6. IN THE CASE OF
U.S.A. VS DENNIS WARREN

7. CHARGE/OFFENSE (U.S. or Other Code Citation)
21:841, 843, 844 & 846

8. ☐ PETTY OFFENSE
☒ FELONY ☐ MISDEMEANOR

9. PROCEEDINGS (Describe briefly)
Trial/Sentencing

10. PERSON REPRESENTED (Full Name)
DENNIS WARREN

11. PERSON REPRESENTED
1 ☒ Defendant — Adult
2 ☐ Defendant — Juvenile
3 ☐ Appellant
4 ☐ Appellee
5 ☐ Habeas Petitioner
6 ☐ 2255 Petitioner
7 ☐ Material Witness
8 ☐ Parolee Charged With Violation
9 ☐ Probationer Charged With Violation
0 ☐ Other:

12. MAG. DOCKET NO.

13. DIST. DOCKET NO.
Cl-83-4-01

14. APPEALS DOCKET NO.

15. COURT ORDER
☒ Appointing Counsel ☐ Ext. Appointment for Appeal ☐ Subs. Counsel for: _____ Name

Because the above-named "person represented" has testified under oath or has otherwise satisfied this court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 16 is appointed to represent this person in this case.

Appt. Date _____ Voucher No. _____

▶ /s/ Bruce M. Van Sickle
Sig. of Judge/Magistrate or By Order of Court (Clerk/Deputy)

▶ March 14, 1983
Date of Order

▶ _____
Nunc Pro Tunc Date

16. NAME OF ATTORNEY/PAYEE AND MAILING ADDRESS
Robert J. Snyder
219-1/2 East Broadway
Bismarck, North Dakota 58501

17. TELEPHONE No.
(701) 258-1611

18. SOCIAL SECURITY NO.
475-52-1817

CLAIM FOR SERVICES AND EXPENSES

19.	SERVICE	HOURS	DATES	AMOUNTS CLAIMED
IN COURT	a. Arraignment and/or Plea	-0-		Multiply rate per hour times total hours to obtain "In Court" compensation. Enter total below.
	b. Motions and Requests	-0-		
	c. Bail Hearings	-0-		
	d. Sentence Hearings	1.75	June 7, 1983	
	e. Trial	35.00	May 2 - 6, 1983	

CLAIM FOR SERVICES OR EXPENSES

19.	SERVICE	HOURS	DATES	AMOUNTS CLAIMED
IN COURT	a. Arraignment and/or Plea	-0-		Multiply rate per hour times total hours to obtain "In Court" compensation. Enter total below.
	b. Motions and Requests	-0-		
	c. Bail Hearings	-0-		
	d. Sentence Hearings	1.75	June 7, 1983	
	e. Trial	35.00	May 2 - 6, 1983	
	f. Revocation Hearings	-0-		
	g. Appeals Court	-0-		19A. TOTAL IN COURT COMP.
	h. Other (Specify on additional sheets)	-0-		
	(Rate per hour = $30.00) TOTAL HOURS =	36.75		$ 1,102.50
20. OUT OF COURT	a. Interviews and conferences	20.89	Mar. 15-Jul.8, 83	Multiply rate per hour times total hours. Enter total "Out of Court" compensation below.
	b. Obtaining and reviewing records	8.50	Mar. 15-Jul.8, 83	
	c. Legal research and brief writing	7.07	Mar. 15-Jul.8, 83	
	d. Travel time (Specify on additional sheets)	-0-		20A. TOTAL OUT OF COURT COMP.
	e. Investigative and other work (Specify on additional sheets)	-0-		
	(Rate per hour = $20.00) TOTAL HOURS =	36.46		$ 729.20

21. OTHER	ITEMIZATION OF REIMBURSABLE EXPENSES	AMT. PER ITEM	
	Long distance telephone calls	~~$43.60~~	See instructions regarding the requirement to attach receipts.
	93 photocopies at 25 cents each	23.25	
			21A. TOTAL ITEMIZED EXP.
			$ 66.85

22. CERTIFICATION OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case previously been applied for? ☐ YES ☒ NO

If yes, were you paid? ☐ YES ☐ NO If yes, by whom were you paid? _____ How much? _____

Has the person represented paid any money to you, or to your knowledge to anyone else, in connection with the matter for which you were appointed to provide representation? ☐ YES ☒ NO If yes, give details on additional sheets.

I swear or affirm the truth or correctness of the above statements ▶ _____ Signature of Attorney/Payee ▶ Date: 8/9/83

23. GRAND TOTAL CLAIMED $ 1,898.55

24. DEDUCT PRIOR PYMTS. $ -0-

25. NET AMOUNT CLAIMED $ 1,898.55

26. APPROVED FOR PAYMENT

Signature of Judge/Magistrate ▶ Bruce M. Van Sickle ▶ Date:

Signature of Chief Judge, Ct. of Appeals ▶ BPL ▶ Date: 11-16-83

Excess payment approved under 18 U.S.C. 3006A(d)(3)

27. AMT. APPROVED/CERT. $ 1796.05

28. AMOUNT APPROVED $ 1023.25

Copy 1 - Mail to Administrative Office after service rendered

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

DATE: September 6, 1983

TO: Judge Van Sickle

FROM: DONALD P. LAY, Chief Judge.

IN RE: Cl-83-4-01. U.S.A. v. Dennis Warren

I am returning herewith CJA20 in the above-entitled matter. Pursuant to the Guidelines for the Administration of the Criminal Justice Act, counsel needs to submit with his voucher a detailed memorandum supporting his claim (see 2.22 B, second paragraph).

Additionally, counsel should support his claim for long distance calls by attaching an itemized list with reasonable documentation.

I would appreciate your requesting the above from Mr. Snyder. Upon receipt of the above, Judge Lay will be able to process the voucher. Thanks for your help.

/s/ june boadwine

Encl.

BICKLE, COLES AND SNYDER, CHARTERED
Attorneys at Law
219½ East Broadway
The Little Building
P.O. Box 2071
Bismarck, North Dakota 58502-2071

Gregory L. Bickle
James J. Coles
Robert J. Snyder

Telephone
(701) 258-1611

September 20, 1983

Helen Monteith
Clerk of Federal Court
Federal Building
3rd Street & Rosser Avenue
Bismarck, ND 58501

Re: Dennis Warren

Dear Ms. Monteith:

Enclosed with this letter you will find a copy of our billing records with regard to the above-entitled individual. These are all of the records which we have in our possession.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED
/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

RJS/jft
enclosures

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 03/31/83
RE: 83-92 DelCocai Page 1

Date	Description	Amount
	Previous Balance:	$.00
03/15/83	Telephone Conference With Client √	3.00
03/21/83	Telephone Conference With Client √	10.00
03/15/83	Telephone Conference With Client √	6.60
03/15/83	Telephone Conference With Opposing Attorney √	5.00
03/16/83	Telephone Conference With Opposing Attorney √	4.00
03/14/83	Telephone Conference With Opposing Attorney √	2.00
03/21/83	Telephone Conference With Opposing Attorney √	3.00
03/21/83	Telephone Conference With Opposing Attorney √	3.00
03/17/83	Telephone Call On Behalf Of Client √	2.00
03/14/83	Telephone Call On Behalf Of Client √	3.00
03/14/83	Telephone Call On Behalf Of Client √	3.00
03/15/83	Telephone Call On Behalf Of Client √	3.00
03/14/83	Telephone Call On Behalf Of Client √	2.00
03/15/83	Telephone Call On Behalf Of Client √	3.00
03/21/83	Telephone Call On Behalf Of Client √	2.00
03/22/83	Telephone Call On Behalf Of Client √	2.00
03/21/83	Telephone Call On Behalf Of Client √	2.00
03/17/83	Attended Conference On Behalf Of Client √	10.00
03/23/83	Drafted Letter On Behalf Of Client √	6.60
03/21/83	Performed Legal Research On Pertinent Case Law √	20.00

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 03/31/83
RE: 83-92 DelCocai Page 2

Date	Description	Amount
	Previous Balance:	
03/21/83	Performed Legal Research On Pertinent Statutory Provisions √	20.00
03/21/83	Performed Legal Research On Pertinent Statutory Provisions √	15.00
03/17/83	Performed Investigation In Regard To Client's Case √	20.00
03/15/83	Long Distance Telephone Charges √	3.50
03/15/83	Long Distance Telephone Charges √	4.25
03/21/83	Long Distance Telephone Charges √	16.70
	New Charges	174.65
	New Balance	$174.65

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 04/30/83
RE: 83-92 DelCocai
Page 1

Date	Description	Amount
	Previous Balance:	$174.65
04/26/83	Telephone Conference With Client √	2.00
04/21/83	Telephone Conference With Client √	3.00
04/20/83	Telephone Conference With Client √	2.00
04/26/83	Telephone Conference With Client √	3.00
04/20/83	Telephone Conference With Client √	2.00
04/29/83	Telephone Conference With Client √	3.00
04/28/83	Telephone Conference With Opposing Attorney √	6.60
04/28/83	Telephone Conference With Opposing Attorney √	6.60
04/20/83	Telephone Conference With Opposing Attorney √	2.00
04/26/83	Telephone Conference With Opposing Attorney √	3.00
04/26/83	Telephone Conference With Opposing Attorney √	2.00
04/29/83	Telephone Conference With Opposing Attorney √	2.00
04/26/83	Telephone Call On Behalf Of Client √	2.00
04/18/83	Telephone Call On Behalf Of Client √	2.00
04/20/83	Telephone Call On Behalf Of Client √	2.00
04/27/83	Telephone Call On Behalf Of Client √	6.00
04/27/83	Telephone Call On Behalf Of Client √	6.00
04/28/83	Telephone Call On Behalf Of Client √	4.00
04/28/83	Telephone Call On Behalf Of Client √	15.00
04/28/83	Telephone Call On Behalf Of Client √	—15.00

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 04/30/83
RE: 83-92 DelCocai
Page 2

Date	Description	Amount
	Previous Balance:	
04/28/83	Telephone Call On Behalf Of Client √	5.00
04/26/83	Telephone Call On Behalf Of Client √	2.00
04/04/83	Conference With Client √	6.60
04/18/83	Drafted Letter To Client √	6.60
04/21/83	Drafted Letter To Clerk Of Court √	6.60
04/21/83	Drafted Motion On Behalf Of Client √	6.60
04/18/83	Drafted Motion On Behalf Of Client √	6.60
04/29/83	Performed Investigation In Regard To Client's Case √	23.00
04/28/83	Reviewed Client's Records And Files √	15.00
04/18/83	Drafted Affidavit/Admission Of Service √	5.00
04/21/83	Drafted Affidavit/Admission Of Service √	5.00
04/21/83	Prepared Jury Instructions √	30.00
04/25/83	Photocopies At $.25 Each √	8.00
04/04/83	Photocopies At $.25 Each √	11.50
04/19/83	Photocopies At $.25 Each √	1.25
04/20/83	Long Distance Telephone Charges √	2.65
04/21/83	Long Distance Telephone Charges √	2.80
04/20/83	Long Distance Telephone Charges √	4.00
04/26/83	Long Distance Telephone Charges √	3.10

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 04/30/83
RE: 83-92 DelCocai Page 3

Date	Description	Amount
	Previous Balance:	
	New Charges	210.50
	New Balance	$385.15

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 05/31/83
RE: 83-92 DelCocai Page 1

Date	Description	Amount
	Previous Balance:	$385.15
05/13/83	Telephone Conference With Client √	3.00
05/09/83	Telephone Conference With Client √	2.00
05/24/83	Telephone Conference With Client √	3.00
05/09/83	Telephone Conference With Client √	2.00
05/11/83	Telephone Conference With Client √	2.00
05/12/83	Telephone Conference With Client √	6.00
05/11/83	Telephone Conference With Client √	5.00
05/13/83	Telephone Call On Behalf Of Client √	2.00
05/11/83	Telephone Call On Behalf Of Client √	2.00
05/12/83	Telephone Call On Behalf Of Client √	6.00
05/11/83	Telephone Call On Behalf Of Client √	2.00
05/12/83	Telephone Call On Behalf Of Client √	6.00
05/24/83	Telephone Call On Behalf Of Client √	2.00
05/05/83	Conference With Client √	20.00
05/06/83	Conference With Client √	20.00
05/01/83	Conference With Client √	55.00
05/02/83	Conference With Client √	20.00
05/03/83	Conference With Client √	20.00
05/04/83	Conference With Client √	20.00
05/09/83	Attended Conference On Behalf Of Client √	6.60

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 05/31/83
RE: 83-92 DelCocai Page 2

Date	Description	Amount
	Previous Balance:	
05/09/83	Drafted Motion On Behalf Of Client √	6.60
05/09/83	Drafted Motion On Behalf Of Client √	6.60
05/03/83	Appeared For Client At Jury Trial √	140.00
05/05/83	Appeared For Client At Jury Trial √	160.00
05/02/83	Appeared For Client At Jury Trial √	140.00
05/06/83	Appeared For Client At Jury Trial √	160.00
05/04/83	Appeared For Client At Jury Trial √	140.00
05/03/83	Reviewed Client's Records And Files √	20.00
05/01/83	Reviewed Client's Records And Files √	35.00
05/05/83	Reviewed Client's Records And Files √	20.00
05/02/83	Reviewed Client's Records And Files √	20.00
05/04/83	Reviewed Client's Records And Files √	20.00
05/06/83	Photocopies At $.25 Each √	1.00
	New Charges	1,073.80
	New Balance	$1,458.95

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 06/30/83
RE: 83-92 DelCocai Page 1

Date	Description	Amount
	Previous Balance:	$1,458.95
06/14/83	Telephone Conference With Client √	3.00
06/06/83	Telephone Conference With Client √	3.00
06/06/83	Telephone Conference With Opposing Attorney √	6.00
06/06/83	Telephone Call On Behalf Of Client √	3.00
06/06/83	Telephone Call On Behalf Of Client √	2.00
06/06/83	Telephone Call On Behalf Of Client √	2.00
06/06/83	Telephone Call On Behalf Of Client √	6.00
06/07/83	Conference With Client √	10.00
06/06/83	Conference With Client √	15.00
06/07/83	Attended Conference On Behalf Of Client √	10.00
06/29/83	Attended Conference On Behalf Of Client √	12.00
06/06/83	Attended Conference On Behalf Of Client √	15.00
06/29/83	Drafted Letter On Behalf Of Client √	6.60
06/07/83	Appeared In Court On Behalf Of Client √	50.00
06/14/83	Drafted Notice/Hearing Notice On Behalf Of Client √	20.00
06/06/83	Long Distance Telephone Charges √	2.90
	New Charges	166.50
	New Balance	$1,625.45

Please Return Top Portion of Statement With Your Payment.

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STATEMENT

Dennis Warren
5617 Jay Road
Boulder, CO 80302

Acct. No. 445
Services thru 07/31/83
RE: 83-92 DelCocai
Page 1

Date	Description	Amount
	Previous Balance:	$1,625.45
07/08/83	Telephone Call On Behalf Of Client	4.00
07/13/83	Photocopies At $.25 Each	1.50
07/08/83	Long Distance Telephone Charges	3.70
	New Charges	9.20
	New Balance	$1,634.65

Please Return Top Portion of Statement With Your Payment.

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

DATE: September 26, 1983

TO: Judge Van Sickle
Attention: Helen Monteith

FROM: DONALD P. LAY, Chief Judge

IN RE: C1-83-4-01. U.S.A. v. Dennis Warren

Helen, I am returning the CJA voucher again in the above case. Mr. Snyder has the numerical amounts (dollars) in his itemization for the various amounts of time spent—we need to have the number of hours or portions of hours in each instance; granted, I suppose we could figure it out by doing the division, but we don't have that kind of time; therefore, would you please have him resubmit his itemization so that the amount of time is broken down into the various categories of "in court" and "out of court", and then put his out-of-pocket expenses in a separate sheet. The itemization of time, of course, should then conform with the total number of hours on the front of the voucher at the $30 and $20 rate.

Thanks.

/s/ June Boadwine

Encl.

BICKLE, COLES AND SNYDER, CHARTERED
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Bismarck, North Dakota 58502-2071

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Robert J. Snyder

Telephone
(701) 258-1611

October 6, 1983

Helen Monteith
Federal Building
3rd Street & Rosser Avenue
Bismarck, ND 58501

Re: United States of America vs. Dennis Warren

Dear Helen:

I am in receipt of the letter of September 26, 1983, from the Eighth Circuit Court of Appeals, in which our latest attempt to justify our time and expenses for Dennis Warren has again been set back. This letter is for the purpose of responding to that letter.

In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this

work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED

/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

UNITED STATES COURT OF APPEALS
Eighth Circuit

Donald P. Lay
Chief Judge
P. O. Box 30908
St. Paul, Minnesota 55175

November 3, 1983

The Hon. Bruce M. Van Sickle
United States District Judge
P. O. Box 670
Bismarck, North Dakota 58501

Re: C1-83-4-01. U.S.A. v. Dennis Warren.

Dear Judge Van Sickle:

I am enclosing copies of recent correspondence of attorney Robert J. Snyder to your secretary, Helen Montieth, and from your secretary to my administrative assistant,

June Boadwine. It is unfortunate that this matter now requires additional time, but because of the responses made by your secretary and Mr. Snyder, it is necessary for me to intervene.

I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.

The Criminal Justice Act was passed as a response to the inadequacy of a prior system which did not award any type of reimbursement of expenses or time spent by a lawyer. I'm confident it was true when you were in practice as it was when I represented indigents that the bar performed without any reimbursement of either expenses or attorneys' fees. This pro bono work was considered to be a part of our professional responsibility. The CJA was never intended to provide a reasonable attorney fee, only to provide funds to cover overhead and expenses.

Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, my concern now is related to the apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it. In the original instance, Mr. Snyder failed to forward any time itemization, contrary to the statutory guidelines, and on that basis and based upon my direction to my administrative assistant, the claim for services was returned to you with the request that compliance be obtained. Mr. Snyder then itemized the amounts in dollars, but failed, as requested by the Administrative Office, to set forth the number of hours or portions of hours in each instance on his itemized schedule.

We were unable to ascertain whether he was charging time under his own fee schedule or that of the statute. In addition, he failed to itemize his out-of-pocket expenses on a separate sheet. Although these requirements may seem technical, under the Criminal Justice Act the federal government is dealing in millions of dollars and Congress requires proper itemization so that budgetary limitations may be accounted for in a proper manner.

As you know, processing these vouchers takes a good deal of time on my part, as well as on the part of every district judge who must approve them. If a district judge's staff is to assist, it is essential they understand the guidelines and require attorneys to comply with them. If a voucher is not properly submitted and checked by the district court, it requires a great deal of time on my part in getting ultimate approval of it by the Administrative Office. Volume VII of the Guide to Judiciary Policies and Procedures contains the guidelines. However, when a lawyer becomes disrespectful and refuses to follow the guidelines and refuses to cooperate with the court, then it is a more significant problem.

Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be appointed to represent indigent criminal defendants. As far as the court in concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one

year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made.

In view of Mr. Snyder's attitude and refusal to assist the court in processing this voucher under the guidelines, I am approving a fee for him only to the statutory limit and properly itemized expenses.

Before taking the steps noted above, I would appreciate your views on the matter.

Sincerely,

/s/ Donald P. Lay
Donald P. Lay

/j
Encls.

cc: Mr. Robert Snyder

Encls.

UNITED STATES COURT OF APPEALS
Eighth Circuit

Donald P. Lay
Chief Judge
P. O. Box 30908
St. Paul, Minnesota 55175

November 15, 1983

The Hon. Bruce M. Van Sickle
United States District Judge
P. O. Box 670
Bismarck, North Dakota 58501

Re: Mr. Robert Snyder (C1-83-4-01. U.S.A. v. Dennis Warren).

Dear Judge Van Sickle:

Thank you for your letter of November 9 relative to the above CJA matter. I appreciate your comments.

At this point, I feel that if Mr. Snyder wishes to write the court offering his apology to the court for his disrespectful comments, and assuring the court that he will in the future be willing to comply with the requirements of the CJA and the guidelines, I will then be willing to recommend to the court that the order to show cause not be filed and, as a result, become public record.

Should Mr. Snyder not choose to honor this request, it will then become necessary for me to have the show cause order issued. I would appreciate your contacting Mr. Snyder in this regard.

Best regards.

Sincerely,

/s/ Donald P. Lay
Donald P. Lay

/j

P.S. I am enclosing herewith the CJA20. I have approved a fee of $1,000 and expenses for copies of $23.25. I have deleted the sum of $43.60 for long distance calls because of Mr. Snyder's failure to comply with the request to identify the calls. DPL

UNITED STATES DISTRICT COURT
District of North Dakota
P. O. Box 670
Bismarck, North Dakota 58501

Bruce M. Van Sickle
Judge

December 12, 1983

The Honorable Donald P. Lay
Chief Judge
United States Court of Appeals
for the Eighth Circuit
Box 30908
St. Paul, Minnesota 55175

Dear Judge Lay:

I have had the problem of Mr. Robert Snyder in my mind, of course, ever since your first letter, and I have held off responding because Mr. Snyder had a juvenile matter to which he had already been appointed when this problem arose.

I have had two conversations with Mr. Snyder. He sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. I, of course, see it as a youthful and exuberant expression of annoyance which has now risen to the level of a cause. The second conversation was late Friday after the dispositional hearing on the juvenile. And I believe Mrs. Monteith talked to him today.

He has decided not to apologize, although he assured me he did not intend the letter as you interpreted it.

Yours truly,

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle

(Filed December 22, 1983)

UNITED STATES COURT OF APPEALS
for the Eighth Circuit

Re: ROBERT J. SNYDER) ORDER TO SHOW CAUSE

On October 6, 1983, Robert J. Snyder, a duly licensed attorney in the State of North Dakota, requested the United States District Court of the District of North Dakota to remove his name from the list of attorneys who will represent indigent criminal defendants. His refusal to defend criminal indigents appears to be based partly on his contention that the attorneys' fees allowable to court-appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A, do not afford reasonable compensation. Mr. Snyder also has refused to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorneys' fees.

On November 15, 1983, as Chief Judge of this court, I instructed United States District Judge Bruce M. Van Sickle to remove Mr. Snyder's name from the list of attorneys in North Dakota who are eligible to be appointed to defend indigents in criminal cases.

In *Williamson v. Vardeman,* 674 F.2d 1211, 1215 (8th Cir. 1982), this court recognized the inherent duty and obligation of a lawyer, as an officer of the court, to represent indigents without fee. This court relied, in part, *on United States v. Dillon,* 346 F.2d 633, 635-636 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966), wherein the court stated:

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the

profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a "taking of his services." Cf. Kunhardt & Company, Inc. v. United States, 266 U.S. 537, 45 S.Ct. 158, 69 L.Ed. 428 (1925).

In Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), the Supreme Court held, in a capital case where the defendant was unable to employ counsel and was incapable of making his own defense adequately because of ignorance, etc., that it was the duty of the court to assign counsel for him, and stated at page 73, 53 S.Ct. page 65:

> "Attorneys are officers of the court, and are bound to render service when required by such an appointment."

346 F.2d at 635 (footnote omitted).

In view of Mr. Snyder's refusal to carry out his obligations as a practicing lawyer and as an officer of this court, he is HEREBY ORDERED TO SHOW CAUSE within thirty days of this Order as to why he should not be suspended from practice in the federal district court, as well as in the United States Court of Appeals for the Eighth Circuit, for such period of time as his refusal to serve continues. Pursuant to Rule 46 of the Federal Rules of Appellate Procedure, Mr. Snyder may request a hearing on his response before the full court. He shall file his

response with the Clerk of the United States Court of Appeals for the Eighth Circuit in St. Paul, Minnesota.

IT IS SO ORDERED.

/s/ Donald P. Lay
Chief Judge

Dated December 20, 1983.

(Filed January 16, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Re: Robert J. Snyder

RETURN TO ORDER TO SHOW CAUSE

FACTS

The following is a history of the development of the present proceeding:

On March 14, 1983, the undersigned was appointed by the Federal District Court for the District of North Dakota, Southwestern Division, to represent, on an indigent basis, Dennis Warren, who was charged with approximately six counts relating to cocaine trafficking. The normal pre-trial work was performed, and a jury trial was held in Federal District Court, lasting one full week, May 2-6, 1983. Mr. Warren was convicted on all counts.

On August 9, 1983, the undersigned filled out and sent to the Clerk of the Federal District Court the standard federal claim for services and expenses. The total

amount of the claim was $1,898.55. A copy of the claim voucher and cover letter are attached hereto.

On August 17, 1983, Judge Van Sickle reduced the claim by $102.50, approved it, and forwarded the claim to the Eighth Circuit. A copy of Judge Van Sickle's cover letter is attached hereto.

On September 6, 1983, the administrative personnel of the Eighth Circuit returned the claim voucher, requesting itemized support for the claim. A copy of that letter is attached hereto.

On September 20, 1983, the undersigned forwarded to Federal District Court in Bismarck a complete set of his firm's itemized computer sheets for all work performed on the Warren case. A copy of the computer sheets and the cover letter are attached hereto.

On September 26, 1983, the undersigned received from the administrative personnel of the Eighth Circuit another letter rejecting the claim voucher and itemized information, stating that the information was insufficient due to the fact that the computer sheets billed in dollars instead of hours, and, also, because phone records for the requested phone expenses were not attached.

On October 6, 1983, the undersigned sent an admittedly strident letter, responding to the letter of September 26, 1983. A copy of that letter is attached hereto.

On November 3, 1983, the undersigned received from Chief Justice Lay a letter taking offense to the undersigned's letter of October 6, 1983. A copy of that letter is attached hereto.

Subsequent to November 7, 1983, the undersigned was shown a letter from Chief Justice Lay to Judge Van Sickle, in which it was stated that the entire matter would be dropped if the undersigned apologized for the [sic] his letter of October 6, 1983. No response was made by the undersigned.

On December 20, 1983, Chief Justice Lay caused to be issued an Order to Show Cause, which forms the basis of the present proceeding. A copy of the Order to Show Cause is attached hereto.

The undersigned now makes and files a Return to the Order to Show Cause, showing why he should not be suspended from practice before the United States Court of Appeals for the Eighth Circuit, and the courts thereunder.

ARGUMENT

The present proceeding was really initiated when the undersigned drafted and sent the letter of October 6, 1983. Had that letter not been sent, this proceeding would not be taking place. The letter was admittedly harsh in tone, but reflected the frustration of the undersigned with the indigent criminal appointment process as employed by the Federal Courts. This frustration stems from a number of sources.

First, the rates paid by the Federal Courts for indigent appointment, despite allegations to the contrary, do not cover the overhead of the attorney so appointed. This is one of the main reasons why so few attorneys can be found in this area to accept the federal appointments, as will be discussed below.

Second, apart from the actual rates themselves, the procedures which must be followed to collect the indigent appointment fees are oppressive.

In this case, the undersigned made a good faith effort to provide all justification in his possession for the fees and expenses charged. The computer sheets, attached hereto, which were forwarded to the Eighth Circuit in response to the request, are extremely detailed, and contain virtually every item of work and expense performed on the case. They were, quite simply, everything we had in our possession to justify the fee, yet they were rejected.

In addition, the undersigned was required to produce his firm's phone records to justify $43.00 in phone call expenses. In the first place, to go back over several months' phone records for this firm and find the calls in question would be prohibitively time-consuming, more time than would justify providing documentation for a $43.00 expense.

Even more importantly, however, this firm considers its telephone records to be privileged information, and it does not allow the records to be indiscriminately sent out of the office.

In response to the letter of the undersigned of October 6, 1983, the undersigned received the letter from Chief Justice Lay, dated November 3, 1983. The undersigned was, quite honestly, shocked by both its content and unveiled threat. It is interesting to note that the letter of Chief Justice Lay does not overly concern itself with the request of the undersigned to be removed from the panel of the indigent defense counsel. In fact, in the letter the Chief Justice specifically approves the request.

Instead, the letter entirely directs itself to what apparently is perceived as something in the vein of contempt on the part of the undersigned in his letter of October 6, 1983.

The undersigned wishes to state that he has nothing but the greatest respect for both the Federal Courts and the Federal Judiciary. However, the letter of October 6, does correctly state the deep feelings of the undersigned towards a process which is unfairly applied to a limited number of attorneys.

It is also interesting to note that had the undersigned simply apologized for the letter of October 6, 1983, apparently without withdrawing his request for removal from the panel of indigent defense attorneys, the present proceeding would not be taking place.

On December 20, 1983, Chief Justice Lay issued the Order to Show Cause, a copy of which is attached hereto, and to which this document is a response. Again the undersigned was shocked, because the ground for the Order to Show Cause was the undersigned's request for removal from the panel of indigent defense attorneys, something the undersigned, in reviewing the letter of Chief Justice Lay, did not consider to be a matter of offense. However, since specific grounds are being used for the Order to Show Cause, a reply is necessary.

The defense of Dennis Warren was not the first case that the undersigned has undertaken on an indigent basis in Federal District Court in Bismarck.

The records of the Clerk of the Federal District Court in Bismarck show that in the four-year period from Janu-

ary 1, 1980, through December 31, 1983, there were 99 indigent federal appointments for the District of North Dakota, Southwestern Division. Of those 99 appointments, the undersigned received eight, and the other two members of his firm received an additional seven.

Of the eight cases received by the undersigned, three were tried to juries. For the eight cases, the undersigned spent a total of 100.75 hours in court, and 115.53 hours out of court.

The panel of indigent defense counsel for the District of North Dakota, Southwestern Division, a copy of which is attached hereto, contains 88 names. If a strictly rotational appointment system were used for this panel, in the four-year period mentioned above the undersigned should have received 1.12 cases, instead of eight.

However, the panel itself is glaringly deficient in a number of ways. First, the panel was last revised in August, 1980. Among the names on the panel are Burton L. Riskedahl, who has been Burleigh County Judge for a number of years; Maurice R. Hunke, who has been a State District Judge for a number of years; Rick D. Johnson, who has been Solicitor General of the State of North Dakota for a number of years; Robert O. Wefald, who was elected Attorney General of the State of North Dakota in 1980; and John A. Zuger, Sr., who is deceased. One can imagine the number of attorneys who have established practice in Bismarck since August of 1980, who are eligible for the panel but not on it.

As significant as the names which appear upon the panel, are the names which do not appear upon it. The panel does not contain a large number of attorneys, some

of them among the most prominent in the Bismarck-Mandan area. The reason for their absence is easily found.

Attached hereto is a copy of the "Plan Pursuant to the Criminal Justice Act of 1964, as amended, for the United States District Court, District of North Dakota." If one turns to page 2 of the plan, *II. Sources of Names,* one finds the procedure by which attorneys appear on the panel of indigent defense counsel. The pertinent portion reads as follows:

> The State Bar Association of North Dakota, acting by and through its appropriate committee, has recommended a list of attorneys who, in the opinion of such Bar Association, are competent to give adequate representation to parties under the Act, and who are willing to serve.

The critical passages above are "competent to give adequate representation" and "willing to serve." If an attorney does not deem himself competent to act as counsel in a criminal case, his name does not appear on the panel. Further, if an attorney is not willing to serve as indigent defense counsel, his name does not appear on the panel. Given the rates allowable for indigent defense representation, it is readily apparent why a large number of attorneys are simply unwilling to serve.

If one strictly follows the guidelines as set forth in the above-described plan, the undersigned is doing nothing more than express his unwillingness to serve, as have a number of other attorneys. How, then, can the undersigned be singled out for suspension from practicing before the Eighth Circuit and the courts thereunder?

The undersigned has read *Williamson v. Vardeman,* 674 F.2d 1211 (8th Cir. 1982), which is cited in the Order to Show Cause, and has no great argument with the case itself. However, it should be noted that *Williamson* imposes a burden and obligation not only upon individual attorneys, but upon the *legal profession* itself to provide counsel to indigent defendants without adequate compensation.

If *Williamson* is to be applied, it should be applied equally to all practitioners of the legal profession, and not to an extremely small segment thereof who are both "competent" and "willing to serve" as indigent defense counsel in federal cases. In practice, the obligation and burden of representing indigents for less than adequate compensation falls upon a very small number of criminal defense attorneys, among them the undersigned, and excludes the large majority of practicing attorneys. Such a system is not just if that small minority, including the undersigned, is compelled to accept federal appointments, and subsidize its brethren who will not or cannot do so.

If the undersigned is to be compelled to continue to represent indigent clients in federal cases, then the compulsion must extend to all attorneys who practice within the Southwestern Division of the District of North Dakota, regardless of their willingness or competence to serve. The plan referred to above must be revised, all nongovernmental attorneys placed thereon, and the panel be appointed on a strictly rotating basis.

To compel the undersigned to serve, without extending the compulsion generally, and to sanction the undersigned with suspension if he refuses, without sanctioning

generally, is a taking of the undersigned's private property for public use without just compensation and a denial of due process of law, in violation of the Fifth Amendment to the United States Constitution.

Pursuant to Rule 46 of the Federal Rules of Appellate Procedure, the undersigned requests a hearing on this return before the full Court.

Dated this 12th day of January, 1984.

Respectfully submitted,

BICKLE, COLES AND SNYDER, CHARTERED

219-½ East Broadway
P.O. Box 2071
Bismarck, North Dakota 58502-2071

/s/ Robert J. Snyder
By: Robert J. Snyder

Transcript of Proceedings
No. 84-8117 *In Re Attorney Robert J. Snyder*

Chief Judge Lay: Docket No. 84-8117 *In Re Attorney Robert J. Snyder.* I take it Mr. Snyder is in the courtroom?

Mr. Snyder: I am Robert Snyder your honor.

Judge Lay: Are you appearing pro se, or do you have someone representing you?

Mr. Snyder: I am appearing pro se, however, I have with me Mr. David Peterson who appears not as my counsel, but as a representative of the Burleigh County Bar

Association, and he wishes the opportunity to address the court as well.

Judge Lay: Well, we will determine whether that will be allowed. Do you wish to make a statement to the court?

Mr. Snyder: May it please the court, I believe that my position on this matter has been adequately stated in my return. I guess, just by way of emphasis, the specific grounds for the order to show cause on this suspension is my request to be removed from the panel of attorneys who will accept indigent appointments for the Southwestern Division of the District of North Dakota. In my return I attached a copy of the plan for the District of North Dakota, and in that plan the panel of attorneys is comprised of attorneys who are both competent and willing to serve. While I have, in my opinion, done nothing more than declare my unwillingness to appear on the panel any more. And I don't believe that I have done anything untoward and I am in fact following the guidelines of the plan.

Judge Lay: You are following which guidelines?

Mr. Snyder: The guidelines of the plan—I have it attached to my return—the Plan of the United States District Court for the District of North Dakota pursuant to the Criminal Justice Act of 1964 as Amended.

Judge Lay: Mr. Snyder, I ask you, in essence, your return is based upon the concept that you feel that non-sufficient numbers of lawyers are participating in the plan and that your law firm is getting too many of these cases—

Mr. Snyder: That's correct.

Judge Lay: (Continuing) and that you are being disfairly treated?

Mr. Snyder: Well that's obvious, your honor, if you look at Mr. Peterson's resolution or the resolution that was prepared by the Burleigh County Bar Association, there are 276 licensed attorneys, non-governmental—

Judge Lay: Sight assumed all that is true, is that the reason that you do not wish to be available to do this kind of work in the courts?

Mr. Snyder: Partly.

Judge Lay: What's the other reason?

Mr. Snyder: Because of the fees that are paid.

Judge Lay: I was going to come to that. That is a matter you set out in your letter of October 6, to the district court; that the reason that you didn't want to do this work any more is because you felt you are "appalled by the amount of money which the federal court pays for its criminal defense work, and not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation and I'm not sending anything else. You can take it or leave it." Now these are the reasons that were given, and those are reasons that you wish not to continue, is that right?

Mr. Snyder: That is part of the reason, and of course, the other reason is set out in my return. I have done—my firm has done fifteen percent of the cases over the last four years.

Judge Heaney: How many members are in your firm?

Mr. Snyder: Three.

Judge Heaney: And how long have you been in practice?

Mr. Snyder: Since 1977.

Judge Heaney: And how long have your partners been in practice?

Mr. Snyder: The same. We all started at the same time.

Judge Heaney: And how many cases did you hear—or do you plan to serve in 1983?

Mr. Snyder: Possibly two or three.

Judge Heaney: Two or three in 1983? And did any of those go to trial?

Mr. Snyder: The one that this proceeding is about.

Judge Heaney: And how long did that trial take?

Mr. Snyder: One full week.

Judge Heaney: One full week. And the other two cases how much time did you spend on them?

Mr. Snyder: I really don't recall, Your Honor. They were not major cases.

Judge Heaney: A day or two?

Mr. Snyder: Possibly.

Judge Heaney: And you think that this is burdensome on you to spend perhaps as many as two weeks out of fifty-two weeks representing indigent criminals?

Mr. Snyder: Your Honor, the system is not being fairly applied. Our firm has handled fifteen percent of

the cases. If the court is going to compel me—with the threat of suspension—if the court is going to compel me to serve on an indigent basis, then I think the court must compel everyone to serve.

Judge Heaney: Well, I guess I wasn't asking that question. I guess I was asking you whether you felt that you are really being put upon in your being asked as part of your professional responsibilities to spend a couple of weeks, at the most, to represent indigent criminals at least when you get your expenses and perhaps get enough to cover the overhead in the office?

Mr. Snyder: If everyone is spending a couple of weeks, then I don't mind spending a couple of weeks.

Judge Heaney: You haven't made any allegation of poverty and that you otherwise are making an adequate living for yourself—

Mr. Snyder: (Interposing) I'm not getting rich off the practice of law. One thing that's been brought up here in the order to show cause, or maybe it was in one of the letters that Judge Lay wrote, was that the rates that are paid are designed to merely cover overhead. Well if that is the design, it doesn't even do that.

Judge Lay: This court doesn't set those rates. It's set by the Congress of the United States.

Mr. Snyder: I understand that. But I understand also that there is a bill before the Congress to raise the rates and perhaps this court could do some lobbying—

Judge Lay: This court doesn't lobby.

Mr. Snyder: Well, perhaps it could point out to the Congress that there is a real problem.

Judge Lay: The Judicial Conference of the United States has supported that it increase its fees for that for a long time. But you know before the Criminal Justice Act was passed, all of the judges now—lawyers at that time—worked for nothing. We paid our expenses out of our own pockets. It was considered to be an implied obligation of our license to practice law, as I think it's considered to be today.

Mr. Snyder: I believe that's one of the reasons the Act was passed in the first place; to compensate lawyers because they were having problems getting people to do it then.

Judge Lay: But it was recognized that it would not fully compensate, nor was it intended to be reasonable compensation.

Mr. Snyder: Well, if—I have no problem with the compensation remaining the way it is if it is applied to everyone. But the way it is now, out of 256 lawyers there are 30 in the Southwestern Division that are appointed, twenty to drug cases; ten to more serious felonies; and four or five to murders and rapes—and I am one of the four or five. So if there is going to be a compulsion to me to take these cases then I think the court must extend that compulsion to everyone, whether or not they are willing to serve, whether or not they are competent to serve.

Judge Arnold: Let me change the subject a little bit, Mr. Snyder, and ask you something about a letter that you wrote: a letter dated October 6, 1983, to Helen Monteith. I guess I have a copy of it before me and that's the letter where you say that you have to go through extreme gymnastics even to receive the puny amounts which the federal

courts authorize for this work. We have sent you everything we have concerning our representation and I am not sending you anything else. You can take it or leave it. Further I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it." I gather Ms. Monteith is a secretary to Judge Van Sickle?

Mr. Snyder: That's correct.

Judge Arnold: I am bothered by the tone of the letter.

Mr. Snyder: It's harsh. I guess I was—I was fed up at that point, and I guess just by way of expanding on this—this doesn't appear in any of the documents that I filed, but I was appointed on this case on an indigent basis. During the course of the trial it became apparent that my client had misrepresented his financial situation and actually could have afforded to hire a lawyer and was, in fact, fined $35,000 as a part of his sentence. Not only that, but he hired another lawyer to do the appeal. Now, when I submitted the bill, I went through our computer time sheets, I got everything down and that must have taken me a couple of hours there. We sent it in—that wasn't good enough. We then sent in our computer sheets themselves, and that wasn't good enough. But, I guess the thing that really got me—

Judge Lay: Let's stop right here and analyze why it wasn't good enough.

Mr. Snyder: Because it bills in dollars instead of hours.

Judge Lay: That's right. And the regulations put out by the Congress of the United States and the Administrative Office, not by the Eighth Circuit, require you to submit your hours that you have spent on a case so that they can be equated with the statutory fees. Now, you were asked to do that on the first occasion. On the second occasion you sent it back to Ms. Monteith with the computer time sheets, not equated with hours, and then you penned a note—a handwritten note to her, which doesn't appear in the matter—in the letter that you filed of record, that says "these are the charges for Warren, but the amounts aren't exactly right due to our computer's lack of the right money codes.

Mr. Snyder: Right.

Judge Lay: Now how does that help me or my administrative people in figuring out the amount that you're due under the statute.

Mr. Snyder: Well, Judge, if there would have been some question I guess you could have billed—I think there was only like a $200 difference between what we billed and what the computer sheet said. If you wanted to do that then I guess bill—give us the amount that the computer said. But that wasn't really what got me. What got me was a request that we submit our phone records to justify—

Judge Lay: A requirement of the guidelines as well.

Mr. Snyder: Well, your honor, to go through several months of phone records and find those calls—in the first place, we would not send our phone records out of the office. We consider them privilege information, so what would have had to have been done was a secretary to go

through the records and take a magic marker and line out everything except the phone calls—

Judge Lay: Mr. Snyder, there are over 2,000 representations a year in this circuit by attorneys. The last seventeen years every attorney in this circuit has complied with these guidelines and submitted what Congress requires to set out the itemization of the phone bill: where it was made; from whom; on what date; and the amount. No attorney has ever complained, that I have ever known, in complying to that guideline until you have come along at this time.

Mr. Snyder: But do you think that's a basis for suspension?

Judge Arnold: Let me interrupt a minute, Mr. Snyder. I want to get back to this letter I mentioned, but I don't understand the phone call business. Now are you saying that you are required not only to itemize—when I practiced law, of course when I sent a bill I itemized my phone calls. I said: January 1, to New York City—$2.00.

Mr. Snyder: That's what is in the computer records.

Judge Arnold: All right. And are you saying that the court required you not only to itemize, but to submit copies of the actual bills from the telephone company.

Mr. Snyder: That's what was wanted.

Judge Lay: You were simply asked to itemized, weren't you?

Mr. Snyder. The itemization—

Judge Arnold: What appears on your bill here is—it says: April 20, 1983, long distance telephone charges—

$2.65. It doesn't say from where, or to where, or to whom the calls were placed. So, to me, that's all you needed to—and I don't know as much about the regulations as some others do—but, isn't it reasonable to ask you to say to what city the call was placed?

Mr. Snyder: Well, your honor, those—I wouldn't even have any independent recollection of that, because that's the way our computer keeps the time.

Judge Arnold: You don't keep files showing these on your paying clients?

Mr. Snyder: We bill our paying clients the same way.

Judge Arnold: They don't ask you: "Well, who did you call on April 20?"

Mr. Snyder: No.

Judge Arnold: All right. Well, let me go back to the other question I had, which is the letter of October 6. And, I guess, the letter seems somewhat troubled. (Inaudible)

Mr. Snyder: Possibly.

Judge Arnold: I am asking you, sir, if you are prepared to apologize to the court for the tone of you letter?

Mr. Snyder: That is not the basis that I am being brought forth before the court today. Is not an apology. And I could have apologized when an apology was demanded from Judge Lay, and I declined—

Judge Lay: Was requested.

Mr. Snyder: Was requested. Well, it was apologize or I will bring an order to show cause why you should not

be suspended, so I guess I don't know if that's much of a request. But, I didn't apologize then, and I'm not apologizing now, and, by the way, that letter was not sent to the Eighth Circuit, it was sent to Helen Monteith.

Judge Arnold: All right. I just want to get this clear, that you are declining to apologize for the letter of October 6.

Mr. Snyder: I am.

Judge Arnold: All right, sir.

Mr. Snyder: But that's also not the basis of this proceeding. The basis—

Judge Arnold: It's the basis of another proceeding. Because you have a duty as a lawyer to behave yourself in a respectful fashion, just as the courts have a duty to try to understand the problems of bar and to behave with courtesy towards members of the bar. And I have to say, that I think you are failing in your duty.

Mr. Snyder: Will the court have any other questions?

Judge Heaney: I have one question. And I would join in what Judge Arnold has to say, and would add that you appear to be to me a young man with spirit, and intelligence, and competence, and I believe if you could combine that with some humility and some concern for your obligations as a lawyer, you could be successful, but if you aren't, then, you probably won't wind up being a credit to your profession. Having said that, you raised an issue which probably doesn't concern this proceeding, but that is of interest to me, and that is, when it was determined that the defendant had money and had resources, did you go to Judge Van Sickle and report that to him? Because at that

point it seems to me that it really was incumbent on the court to change the nature—

Mr. Snyder: Well, I didn't have to go to—

Judge Heaney: That you were entitled to be paid a reasonable fee for having represented that person. If he could be fined for $35,000.00—has he paid the $35,000.00?

Mr. Snyder: I don't know. The case was turned over to another lawyer on appeal and I have had no more involvement with it. But as far as Judge Van Sickle knowing—

Judge Heaney: Then that should have been pursued and you should have gotten, under those circumstances, a reasonable fee for the work that you've done on the basis of your regular hourly charge, and we would have backed you up to the hilt on that kind of approach.

Mr. Snyder: Well, I didn't have to tell Judge Van Sickle because it came out in open court and he was right there. But I didn't feel it my place to really start doing that in the middle of the trial. I guess I was representing the guy, and what would have happened there is I would have driven a wedge between my client and myself if I would have said "Hey, let's have this guy honey up some money to me. So, there wasn't, at that point, there really wasn't much that could be done. But, it seems to me we're getting far afield here. The question is, can I be suspended from this court for my request to be removed from the panel of attorneys. And—

Judge Lay: The reasons that you request to be removed are interrelated, and the reasons are, as you have indicated, you felt that you get an unfair share, but as you

originally indicated, you didn't feel the fee was right. You felt the Eighth Circuit has abused you because we asked you to comply with the guidelines on two occasions and you refused to do it. And, now the (INAUDIBLE), Mr. Snyder, I have great respect for every lawyer that practices law in this circuit and this country. And, we were all lawyers ourselves at one time. I don't think I've ever stood before a court, as you're standing here, showing the disrespect that you are showing to this tribunal. You've got a chip on your shoulder. Mad. I've given you every opportunity to simply apologize to the court and to indicate that you will continue with your criminal law obligations. That's all I asked Judge Van Sickle to ask you. You refuse to do that. In the order to show cause, which is very simply and succinctly stated, I gave you every opportunity to purge—you wouldn't even have had to bother to the extents of coming down here—by simply writing to the court and saying "yes, you would continue to serve in pro bono obligations when asked and that you will continue to comply with the guidelines." That's all you have to do. That's all you have to do at any time in order to be accepted in this court on good standing. Your refusal to do that will probably lead to your suspension, not only in this court, but in the federal district courts. And, it seems to me, that's the road you wish to travel. And you're—I just caution you, that you're choosing that road yourself. The court isn't directing you to. But because you've got this chip on your shoulder, against the system, you feel that's what you want. You may get the opportunity to pay the price.

Mr. Snyder: Your Honor—

Judge Lay: I think you ought to consider that very carefully. . . . The question that you raise about the inequi-

ties of the North Dakota plan is a concern to this court, and I am making an independent investigation. But the way you handle that is not by being contemptuous and disrespectful to the court, but by simply sitting down with Chief Judge Benson and going to the bar and working something out on a more equitable basis. I am certain that's going to be done. But, the point is, the question whether any lawyer practices in this circuit as a pro bono obligation—not every lawyer is competent to serve. This court will not tolerate the appointment of incompetent counsel to try indigent cases. That in itself, by itself, requires that only a small segment of the bar—. Other lawyers who aren't asked to serve, because they are not competent to try cases, are asked to serve in other capacities, and do other types of pro bono work. If you have that capacity and you appear as a trial lawyer, that is an implied obligation of your license to practice law. If you persist in the idea that you can't carry out those obligations, and those duties, then we have no alternative. But, you hold the key in your hand. I think you really need counsel before you make that determination.

Mr. Snyder: Your honor, I have talked to a lot of people about this present proceeding, and quite honestly, the reaction in Bismarck is that everyone is aghast at it. You've seen some of the correspondence that I have submitted: the resolution by the Burleigh County Bar; the Affidavit from Judge Glaser; the letter from the State Bar Association. I solicited none of that. That was done on their own behest. And, if I'm suspended, I can tell you that the situation in Bismarck will become worse than it already is, because, I don't think you're going to find anybody that will take a case.

Judge Lay: Well then, maybe they all will be suspended from practice.

Mr. Snyder: Maybe.

Judge Lay: Well, I would—I think just administratively, I'll give you ten days, Mr. Snyder, if you wish to write a letter to the court and purge yourself of the concern of the court—all it is is a simple statement that you will take pro bono assignments of the federal courts and that you will comply with the guidelines if you are asked to do so. If you choose not to do that, then simply notify the court and then we'll take it upon ourselves to so act. I suggest that you counsel with someone before you write your letter in defiant or disrespectful terms.

Mr. Snyder: You honor, as far as I would again emphasize that, according to the plan for the District of North Dakota, if I am not willing to serve, I need not serve, and I need not give any reason according to that plan either.

Judge Lay: That isn't the plan of the Eighth Circuit.

Mr. Snyder: It is the plan of the District of North Dakota, the court in which I am appointed on these cases.

Judge Arnold: Let me say one other thing, Mr. Snyder, and that is, when you are thinking about whether to write any further letter, I would like you to consider also whether you might change your position with respect to the letter of October 6.

Mr. Snyder: Does the court wish to hear Mr. Peterson at all?

Judge Lay: Yes.

Mr. Peterson: May it please the court, that I thank you for allowing me to address you on this matter, just briefly, and I do appear here today at the request and direction of the Burleigh County Bar Association, which is the county bar association that Mr. Snyder is a member of, and has been in good standing since 1977. Mr. Snyder and two of his classmates started in a law practice the hard way. They opened up their own office—the three of them —and have built a good reputation as good practitioners, good trial lawyers, and they have been actively involved in a number of community projects and bar association projects and trial attorney projects during the entirety of their practice. The Bar Association heard through the federal courts office in Bismarck about the order to show cause directing Mr. Snyder to appear here, and it was the Bar Association, then, that asked Mr. Snyder to come to the regular meeting that we had most recently and tell us what had gone on, and what the order to show cause involved. There was considerable discussion—

Judge Lay: Did he tell you that he refused to comply with the statutory guidelines and that he told the court that he'd had it up to here and he wasn't interested in complying with it.

Mr. Peterson: Yes, your honor, there was a full discussion of all of the things that the court has addressed to him. And those things are of concern to me as an older practitioner, as well.

Judge Lay: I don't think you would do that, would you Mr. Peterson?

Mr. Peterson: Well, not anymore, Your Honor. I may have at a younger age, but now I guess I would put

the letter in the drawer over the weekend and then maybe redraft it on Monday. But our discussion went beyond that, and the facts and figures that are recited in the Resolution of the Bar Association shows, unequivocally, that Mr. Snyder and his partners have undertaken a far greater load than any other lawyer in our association, and perhaps in our state, and they certainly have given pro bono work, and they have given a great deal more—fifteen percent of the total cases in the last three years they have handled. We believe that they they have shown, and Mr. Snyder particularly, has shown that he is a responsible member of the bar, and I served, your honor, as an assistant United States Attorney for four years, from 1972 to 1976, and this same plan was in effect at that time and unfortunately, the panel of lawyers which is currently in the system, does not include more than about one-third of the total lawyers in the Southwestern Division. And I know, having now practiced in that division for some fifteen years, that there are a lot of lawyers in that division who are good, competent, capable trial lawyers who have told the court when the call is made—that is how they set the panel up—the call is made to the lawyers: do you feel competent to serve and do you want to serve? Because that is what the particular plan says. And there's a lot of those good, competent trial lawyers who have told the court, and said, no, we don't choose to serve. And because they have told the court that, the panel is then—it does not include them. And, unfortunately, I think it's unfair to the rest of them who then do choose to serve because they get an inordinate amount of it. And just as Judge Heaney points out, that perhaps two weeks of time at indigent cases is not an undue burden, but I think that the point is, that many

lawyers are not taking any burden, and their (sic) not doing any pro bono work. Mr. Snyder, in addition to taking this criminal indigent defense work for the federal courts, also serves on several state bar association pro bono panels and the lawyer referral service for divorce clients, at a certain fee. The reason that the Burleigh County Bar directed that I come here and file a Resolution, a copy of which I did file this morning, was to express our, I guess, to express the concern that we have about the plan that currently is in effect in North Dakota. We think it ought to be reviewed and revised.

Judge Lay: I can assure you—

Mr. Peterson: And we believe that the panel, the method of selection of the panel and the updating of the panel, which has not been done since 1980, needs to be done. And to respectfully request that the court not choose to suspend Mr. Snyder—

Judge Lay: Mr. Peterson, let me just suggest to you that I am confident that the plan will be revised and I am confident that it will be revised to the extent that—to express that every lawyer that is in this area has within their obligation in practicing law, explicit within their license to practice law, a duty to render pro bono work. I think that would be the cost of any plan that would come forth. So that would cover all lawyers who are competent. Now our problem is that Mr. Snyder, at least at this point, has taken a position that he will not participate in any plan, because he no longer wants to be on that list.

Mr. Peterson: Your Honor, as I understand Mr. Snyder's position, if the plan is revised and is equally distributed to every lawyer—

Judge Lay: He was asked—

Mr. Peterson: Well, I am not sure if he was asked that direct question.

Judge Lay: Maybe he could counsel with you. I think that would be a good suggestion.

Mr. Peterson: I think that—it's my feeling, in my talking with Mr. Snyder, that if the plan is revised and all lawyers have the same type of obligation, that he will be willing to serve, as he has indicated in the past.

Judge Lay: And comply with the guidelines?

Mr. Peterson: I am sure that he will, your honor.

Judge Lay: And deal with the court respectfully.

Mr. Peterson: I would certainly encourage him to do that.

Judge Lay: Don't you sense that Mr. Snyder could have obviated this whole proceeding by simply suggesting that in the first place?

Mr. Peterson: I suspect that that's true, your honor. And as I said, age sometimes tempers one somewhat.

Judge Lay: We are ready to give him ten days, administratively to—

Judge Heaney: Mr. Peterson, I would like to add just this, and that is, I would hope that you would be working with your bar association and the federal district judges to develop a plan which not only will be acceptable to them, but one in which your members can participate. Now, whether—I don't know whether you have enough of a vote there to have a public defender, part-time public defender

—perhaps not. But if not, we are going to have to come up with some kind of plan, and if the bar gives its support, then it's going to work.

Mr. Peterson: Well, your honor, I can assure you—it just happens that I am a candidate for the position of president-elect of the state bar association at our annual meeting this year. And I can assure you that the present president and myself, if I should become the president-elect, both share a concern over the plan that is currently in effect, and we will work with the courts in order to implement a plan which I think would be fair to all lawyers in our state.

Judge Lay: Just on the assumption that Mr. Snyder will exercise some judgment in this matter, and consult with you, or someone like you. I want to make it clear to Mr. Snyder what it is the court is allowing you ten days lapse here, a period for you to consider. One is, that, assuming there is a general requirement for all competent lawyers to do pro bono work, that you stand willing and ready to perform such work and will comply with the guidelines of the statute. And secondly, to reconsider your position as Judge Arnold has requested, concerning the tone of your letter of October 6. I think that's all we wish to hear about and if you choose not to take any action, you are to so notify the court within ten days.

Mr. Peterson: Thank you, Your Honor.

(Received February 23, 1984)

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Gregory L. Bickle
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Robert J. Snyder

Telephone
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February 22, 1984

Clerk
United States Court of Appeals
For the Eighth Circuit
525 Federal Courts Building
316 North Robert Street
St. Paul, MN 55101

Re: Robert J. Snyder-Misc. 84-8017

Dear Sir:

In response to the oral demands made by the Court to the undersigned at the hearing on the Order to Show Cause, held in St. Paul on February 16, 1984, the undersigned responds as follows:

If and when a new Plan for the implementation of the Criminal Justice Act in the State of North Dakota is enacted, the undersigned will enthusiastically obey its mandates, just as he has obeyed the mandates, or lack thereof, in the existing Plan.

Further, the undersigned states that he will make every good faith effort possible to comply with the Court's guidelines regarding the payment of attorney's fees and expenses.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED
/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law
RJS/cjm

cc: Judge Van Sickle
Judge Benson
Dewey Kautzmann

UNITED STATES COURT OF APPEALS
Eighth Circuit

Donald P. Lay
Chief Judge
P.O. Box 30908
St. Paul, Minnesota 55175

February 24, 1984

Mr. Robert J. Snyder
Bickle, Coles and Snyder
Attorneys at Law
P.O. Box 2071
Bismarck, North Dakota 58502-2071

Re: Order to Show Cause. Misc. No. 84-8017.

Dear Mr. Snyder:

The clerk has forwarded to me a copy of your letter you have written to the court indicating that you will continue to offer your services for pro bono representation under the Criminal Justice Plan.

The court expressed its opinion at the time of the oral hearing that interrelated with our concern and the issuance of the order to show cause was the disrespect that you displayed to the court by way of your letter addressed to

Helen Montieth, Judge Van Sickle's secretary, of October 6, 1983. The court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. You serve as an officer of the court and, as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution.

Before circulating your letter of February 23, I would appreciate your response to Judge Arnold's specific request, and the court's request, for you to apologize for the letter that you wrote.

Please let me hear from you by return mail. I am confident that if such a letter is forthcoming that the court will dissolve the order.

Sincerely,

/s/ Donald P. Lay
Donald P. Lay

cc: Chief Judge Benson
Judge Van Sickle
Mr. Maland, Clerk's Office

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February 27, 1984

Chief Justice Donald P. Lay
c/o Office of the Clerk

United States Court of Appeals
For the Eighth Circuit
525 Federal Courts Building
316 North Robert Street
St. Paul, MN 55101

Re: Robert J. Snyder-Misc. #84-8017

Dear Chief Justice Lay:

I am in receipt of your letter dated February 24, 1984. Pleased be advised that my letter of February 22, 1984, entirely states my position concerning this matter.

I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. You must therefore search your conscience and determine what course of action will be serve the interests of justice and the administration of the Eighth Circuit.

It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on a principle, one must be willing to accept the consequences.

Thank you for your time and attention.

Very truly yours,

Bickle, Coles and Snyder, Chartered
/s/ Robert J. Snyder
Robert J. Snyder
Attorney at law
RJC/cjm

cc: Paul Benson
Bruce Van Sickle
Dwight C. H. Kautzmann

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-8017

In the Matter of:)
Attorney Robert J. Snyder.)
On Order to
Show Cause.

Submitted: February 16, 1984
Filed: April 13, 1984

Before LAY, Chief Judge, HEANEY and ARNOLD, Circuit Judges.

LAY, Chief Judge.

This case comes before us on an order issued to attorney Robert Snyder of Bismarck, North Dakota, to show cause why he should not be suspended from practice in the federal courts. Attorney Snyder has been cited: (1) for his refusal to continue to perform services in indigent cases under the Criminal Justice Act (CJA) 18 U.S.C. §3006A (1982); and (2) for his disrespectful refusal to comply with the guidelines under the CJA relating to the submission of expenses and attorney fees.

Facts.

On March 14, 1983, Attorney Snyder was appointed by Judge Bruce Van Sickle of the District of North Dakota to represent an indigent defendant under the CJA.

There is no issue concerning his services being performed competently. After the proceedings, pursuant to § 3006A (d)(4) of the CJA, Attorney Snyder submitted to the district court a claim for services and expenses in the amount of $1,898.55. On August 17, the district court judge reduced the claim by $102.50 and approved the modified request.

Under the CJA, the chief judge of this court must review and approve any expenditures for compensation in excess of the $1,000 limit. 18 U.S.C. § 3006A(d)(3). Snyder's application was deficient in that the CJA requires an attorney to attach a memorandum of hours expended and an itemized list of expenses.[1] Snyder did not attach the necessary information to his application. Accordingly, his application was returned to the district court with the request that Attorney Snyder provide the proper attachments. Thereafter, Snyder returned the application to the secretary of the district judge with a monetary, not an hourly, breakdown of his time and again without the requested itemization of expenses.[2] Once again his application was returned by the chief judge with the notation that compliance with the CJA guidelines was still necessary to process the application.

Snyder then sent to the ditsrict judge's secretary a letter, dated October 6, "for the purpose of responding to"

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1. *Guidelines for the Administration of the Criminal Justice Act,* Ch. 2 § 3, Vol. VII, Guide to Judiciary Policies & Procedures.

2. Snyder's note accompanying the returned application stated that "the amounts [on the time sheet] aren't exactly right due to our computer's lack of the right money codes."

the chief judge's request. Snyder stated that he was "appalled" at the small amount paid to attorneys for indigent criminal defense work. He indicated his displeasure at the "extreme gymnastics" required to receive "puny amounts." He then stated to the court: "We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it." Snyder concluded his letter by stating that he was "extremely disgusted" by the treatment of him by the Eighth Circuit, that he wished to be taken off the list of attorneys willing to accept appointment in indigent cases, and that he had "simply had it."[3]

Upon receipt of this information, the chief judge requested the district court to confer with Snyder and to determine if Snyder would retract his disrespectful remarks to the court. Snyder refused. On December 22, 1983, this court issued an order to show cause why he should not be suspended from the practice of law in the federal courts for his refusal to offer services under the CJA and to comply with relevant guidelines. Snyder requested a hearing by the full court. *See* Fed. R. App. P. 46(c). The full court voted to refer the matter to a panel.

At oral argument, Attorney Snyder was requested once again to purge himself, as an officer of the court, by agreeing to accept appointment under the Act and by otherwise complying with the Act's guidelines. The panel also requested him to demonstrate in writing that he would be respectful in his relations with the federal courts and

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3. Based upon his refusal to comply with the CJA guidelines, Snyder was denied excess attorney fees and denied unitemized expenses.

to offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October 6. Snyder conditionally offered his continued services under the CJA, but contumaciously refused to retract his previous remarks or apologize to the court.

Attorney Snyder's Remarks to the Court

We first turn to Snyder's refusal to comply with the guidelines under the CJA for documentation of expenses. An integral part of Snyder's refusal to comply with CJA guidelines was his explicit statement of disrespect to the federal court. Snyder's conduct not only constituted disrespect but served as well to impede the orderly processing of attorney fee applications. In this direct sense he has served to impede the administration of justice.

As a member of the North Dakota bar and as a licensed practitioner in both the federal district court and the court of appeals, Attorney Snyder is bound by the ethical canons of the legal profession.[4] The relevant disciplinary rule states: "A lawyer shall not: . . . Engage in conduct that is prejudicial to the administration of justice." The Model Code of Professional Responsibility,

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4. The ethical code adopted by each state defines the professional responsibility of every attorney who is a member of that state's bar. However, as a federal court, our authority to discipline Attorney Snyder is defined in Fed. R. App. P. 46(c):

> Disciplinary Power of the Court over Attorneys. A court [of] appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

DR 1-102(A)(5).[5] Equally important is the recognition that an attorney must maintain the proper respect for the court as an institution. As stated in the Model Code:

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Id. at EC 9-6.

As we will discuss, Snyder now conditionally has offered to serve in indigent cases and to comply with the CJA guidelines. However, in a letter to the court he has otherwise refused to retract or apologize for his disrespectful remarks to the court. He asserts that, although his remarks were "harsh," as a "matter of principle" no further statement is due the court. Letter from Robert J. Snyder to Chief Judge Lay (February 27, 1984).

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5. Although the American Bar Association, has recently adopted new Model Rules of Professional Conduct, the older Model Code of Professional Responsibility is still in effect in North Daokta (the state in which Attorney Snyder practices).

We find Snyder's present statement that he will conditionally comply with the guidelines not enough. His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts. All courts depend upon the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive.[6] This is not to say that courts cannot and should not be subject to proper criticism and comment; however, when an attorney becomes disrespectful in response to a court's request that counsel comply with a congressional mandate, then we deal with a different mat-

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6. It is not respect for the judge personally that is required of attorneys; it is respect for the legal institution that the judge represents. As the Supreme Court of Pennsylvania recently stated:

> The "law" is given corporeal existence in the form of the judge. When carrying out the judicial function, the judge becomes a personification of justice itself. When presiding over any aspect of the judicial process, the judge is not merely another person in the courtroom, subject to affront and insult by lawyers. "The obligation of the lawyer to maintain a respectful attitude toward the court is 'not for the sake of the temporary incumbent of the judicial office,' but to give due recognition to the position held by the judge in the administration of the law." ABA Standards, The Defense Function, § 7.1, Commentary at 259. The judge *is* the court, and a display of insolence and disrespect to him is an insult to the majesty of the law itself.

Commonwealth of Pennsylvania v. Rubright, 414 A.2d 106, 110 (Pa. 1980).

ter. Without hesitation we find Snyder's disrespectful statements as to this court's administration of CJA contumacious conduct. We deem this unfortunate.

We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter Snyder should make application to both this court and the federal district court of North Dakota to be readmitted.

Implementation of the CJA in North Dakota

In further response to the show cause order Attorney Snyder alleges that the implementation of the CJA in North Dakota relies exclusively on an attorney list of those "willing" to serve. He therefore asserts that his refusal to accept any future CJA cases was in compliance with the plan and that he should not be censured for his lack of willingness to serve any more than the vast number of lawyers within the district who were not on the list by reason of their unwillingness to serve. Second, Snyder asserts that, because he lives in a rural area with a smaller population and his firm is willing to try criminal cases, whereas the vast number of lawyers in the district are not so willing, his firm receives a disproportionate number of appointments under the CJA. He also protests that the statutory fee under the CJA is inadequate to compensate him even for his overhead. Third, Snyder complains that the North Dakota list of attorneys willing to serve is not a current list; it does not include lawyers newly admitted to the bar and includes a number of lawyers who are deceased or inactive. He asserts, however, that he is now willing to continue to serve on the CJA panel provided that other qualified attorneys are placed

on the list for appointment. We find merit in Snyder's conditional offer of service.

This court has consistently recognized the duty of an attorney practicing in the federal courts, as an implied obligation, to serve willingly as an officer of the court in a capaicty *pro bono publico* (for the public good). *See, e.g., Peterson v. Nadler,* 452 F.2d 754, 758 (8th Cir. 1971). In the case of *Tyler v. Lark* we noted:

> "An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.'"

Tyler v. Lark, 472 F.2d 1077, 1079 (8th Cir.) (quoting *United States v. Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966)), *cert. denied,* 414 U.S. 864 (1973).

Many state courts have similarly observed that counsel must assist the court by carrying on *pro bono* representation in criminal cases. *See, e.g., Ex parte Dibble,* 310 S.E.2d 440, 441 (S.C. Ct. App. 1983) ("It has been traditionally held that a lawyer, by accepting a license to practice law, becomes an officer of the court and assumes the obligation of representing, without pay, indigent defendants in criminal cases."); *Yarbrough v. Superior Court of Napa County,* 150 Cal. App. 3d 388, —, 197 Cal. Rptr. 737, 741 (Ct. App. 1983) ("An attorney is an officer of the court before which he or she was admitted to practice and

is expected to discharge his or her professional responsibilities [to represent indigents] at all times, particularly when expressly called upon by the courts to do so."). Recently, the Supreme Court of Missouri held that attorneys licensed to practice in the state could be appointed to serve in criminal cases with no compensation:

> "The term 'profession,' it should be borne in mind, as a rule is applied to a group of people pursuing a learned art as a common calling in the spirit of public service where economic rewards are definitely an incidental, though under the existing economic conditions undoubtedly a necessary by-product. In this a profession differs radically from any trade or business which looks upon money-making and personal gain as its primary purpose. The lawyer cannot possibly get away from the fact that his is a public task. . . ."

State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. 1981) (quoting Anton-Hermann Chroust, 1 *The Rise of the Legal Profession in America* x-xi (1965)), *cert. denied,* 454 U.S. 1142 (1982).

The profession of law rests upon its commitment to public service and has long been recognized as a profession that requires its membership to engage in *pro bono* activities. Acceptance of appointment under the CJA, a service that lawyers do not perform totally without compensation, is consistent with this obligation of the members of the bar.[7] Before the CJA provided for compensa-

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7. Although some compensation is afforded an attorney under the CJA, the Act does not attempt to fully compensate an attorney for the work performed. Thus, the Act has a *pro bono* factor built into its compensation scheme. *See infra* note 8 and accompanying text.

tion, many lawyers willingly accepted the defense of indigents in federal criminal cases without expectation of any compensation. The CJA was a recognition by Congress that indigent criminal defendants should have an opportunity to receive the services of competent counsel. Although the compensation allowed by the Act was never intended to fully recompense the lawyer for the time spent on a case, Congress intended that the amount allowed would at least approach the cost of a lawyer's overhead. It is true that the allowances awarded are much lower than the fees charged by many lawyers in non-indigent cases. However, the Act is intended to contain elements of *pro bono* work and not to be merely a government-subsidized, employment service.[8]

The North Dakota plan which contemplates that only lawyers who willingly volunteer for appointments will be assigned to indigent cases appears to rest on the Model Plan approved by the Criminal Justice Committee of

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8. The legislative history of the CJA states:

> As reported by the subcommittee, H.R. 4816 provided for compensation to court-appointed attorneys at a rate not to exceed $15 per hour for time reasonably spent, and carefully accounted for, on behalf of an impoverished defendant. This amount was conceded by virtually every witness at the hearings to be below normal levels of compensation in legal practice. It was nevertheless widely supported as a reasonable basis upon which lawyers could carry out their profession's responsibility to except [sic] court appointments, without either personal profiteering or undue financial sacrifice. . . .

H.R. Rep. No. 864, 88th Cong., 2nd Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2997-98. Since the enactment of the CJA, the hourly rate of compensation for attorneys has increased to $20 for preparation time and $30 for trial time.

the Judicial Conference.[9] Nonetheless, we find that Snyder's objections raise considerable concern as to the efficacy of any plan which depends totally upon voluntary participation.[10]

We find merit in the reasoning that there is an implied obligation to perform *pro bono* trial services on every licensed attorney who is engaged in litigation, not just those who are willing to come forward. The plan as now constituted penalizes those who specialize in criminal law because more than their share of the district's *pro bono* work falls on their shoulders; under a voluntary plan, particularly in rural areas, only a few attorneys come forward and this unduly results in a disproportion of assignments to a minority of the lawyers practicing in the district. Also, appointing only those who feel they have competence in criminal cases in no way assures competency; it is common knowledge that many counsel appointed by district courts under the CJA are young lawyers just out of law school trying to gain early experience in the trial of cases.

Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan. However, his conditional agree-

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9. "Model Plan for the Composition, Administration and Management of the Panel of Private Attorneys under the Criminal Justice Act," *Guidelines for the Administration of the Criminal Justice Act,* Vol. VII, App. G, Guide to Judiciary Policies and Procedures.

10. We note that, in districts where a federal public defender program assumes a substantial representation of indigents in criminal cases, the plan adopted may be more flexible in accepting volunteers.

ment to serve in the future, if other attorneys who are competent to try cases are included on the panel, also has considerable merit. Under the Criminal Justice Act each district is required to submit for approval its plan for implementation of the CJA to the Judicial Council of the Circuit. 18 U.S.C. § 3006(a). We therefore refer the study as to alleged insufficiency of participation of the bar in the panels of the CJA to the district courts and the Judicial Council.

We recognize that any requirement that all active, licensed trial practitioners be eligible for appointment under the CJA raises the immediate question of competency and the continuing concern of the courts and the bar over the increasing number of suits relating to the charge of ineffective assistance of counsel in criminal cases. But in our judgment the fear of incompetent counsel being appointed is, for the most part, exaggerated.

The most common successful complaint relating to ineffective assistance of counsel is the failure of the lawyer to adequately investigate the case and to call defense witnesses. *See, e.g., United States v. Baynes,* 687 F.2d 659 (3rd Cir. 1982); *Eldridge v. Atkins,* 665 F.2d 228 (8th Cir. 1981), *cert. denied,* 456 U.S. 910 (1982); *Rummel v. Estelle,* 590 F.2d 103 (5th Cir. 1979). Competent lawyers who specialize in civil trials know that the success or failure of a trial depends on the thoroughness of the investigation of facts and of the trial preparation. This basic rule of trial preparation is true for civil as well as criminal cases; the attorney who is competent to practice in civil matters is competent to appear in criminal cases. Lawyers who specialize in civil cases must necessarily engage in a diversity of study in all spheres of our social, political, and

economic systems. The step across to the criminal law, by the experienced civil trial attorney, is really no step at all.

We also recognize that many civil trial lawyers are not currently conversant with the Rules of Criminal Procedure and the various rules governing the practice of criminal law.[11] Nonetheless we would deem it incumbent on the civil trial bar to become familiar with these rules, as they would any other procedural or substantive rule of law not previously encountered. Most civil lawyers are generalists; when confronted with a specialized area of litigation, they quickly master the law and the facts. Few lawyers process their first appeal to this court or to the Supreme Court of the United States without doing special study to master the new procedure at hand. We suggest that it is no more difficult to conduct a criminal trial than it is to conduct an intricate 10b-5 securities case or a complicated products-liability case.

Much of the criticism that has been leveled at the trial bar as to the lack of effective representation has focused on lawyers representing indigents in criminal

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11. The Model Plan provides:

> Attorneys who serve on the CJA Panel must be members in good standing of the federal bar of this district, and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure and the Federal Rules of Evidence.

We note, generally, that knowledge of the Federal Rules of Criminal Procedure and Federal Rules of Evidence is necessary to pass most state bars. It is reasonable to assume that a lawyer may be called upon some day to use the skills which he or she was required to demonstrate to enter the legal profession.

cases.[12] While ineffective assistance of counsel certainly can occur in appointed-counsel cases, charges of incompetency of the criminal trial bar are distorted by the placing of the burden of indigent representation totally on a small segment of the bar. Skilled and experienced civil trial attorneys, some of the best advocates in the profession, are excused from service under the CJA by the Model Plan and district plans adopted in conformity therewith. It is immaterial whether their absence is related to the lack of economic incentive to serve under the CJA or to their alleged lack of experience in the criminal field. Clearly, when such a large number of competent trial attorneys are categorically removed from participation, services rendered to indigents will not consistently meet the highest standards of criminal representation. We do not believe that Congress, in passing the CJA, intended *pro bono* representations to fall upon the few; in this sense we think careful study by the district courts and the Judicial Council should be given to the idea that all active trial lawyers in the federal courts be obligated to provide *pro bono* services to the indigent either in the civil law or in the criminal defense field. *Cf. Nelson v. Redfield Lithograph Printing,* No. 83-2248 (8th Cir. Feb. 22, 1984).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT
/s/ Robert D. St. Vrain

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12. For example, Chief Justice Burger has expressed concern that indigents suffer most from "incompetent trial advocates." Burger, *Some Further Reflections on the Problem of Adequacy of Trial Counsel,* 49 Fordham L. Rev. 1, 8 (1980). Judge Bazelon, a distinguished jurist of the D.C. Circuit, has been critical of the competency of the criminal defense bar for years. *See, e.g.,* Bazelon, *The Defective Assistance of Counsel,* 42 U. Cin. L. Rev. 1 (1973). Our opinion disagrees with Judge Bazelon's views that civil trial lawyers are not competent to try criminal cases. Judge Bazelon states that the time and money spent by a civil lawyer in learning how to try a criminal case "would be immense" and that too many of these lawyers would have to "rediscover the wheel." He also adds that the "uptown lawyer" often has a serious communication problem with the indigent client and that they are "not prepared for the cultural shock of learning that their client is neither middle class nor cast in their image of the 'deserving poor.' "

We must respectfully disagree. There is no empirical data to support Judge Bazelon's theory. The fact is, the present system of allowing only volunteers to come forward for appointment under the CJA brings forth many inexperienced, young lawyers looking for their first case to try. Appointing only those who specialize in criminal cases conveniently shields a vast number of experienced lawyers who seek an exclusive, civil practice because of the higher monetary rewards involved. The CJA is not designed to compensate any lawyer for his or her self-education. Nonetheless, we are confident that skilled civil trial lawyers could adjust to criminal practice, first, out of the professional obligation to provide effective counsel for the defendant; and second, out of concern for the quality of representation to be found generally in our courts and our profession.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-8017

In the Matter of:) On Order to Show
Attorney Robert J. Snyder.) Cause

PETITION FOR REHEARING IN BANC

RULE 16(d) 8th CIR.R. REQUIRED STATEMENT

We express a belief, based on a reasoned and studied professional judgment, that this appeal raised the following questions of exceptional importance: (1) denial of due process, (2) failure to disqualify pursuant to 28 USC § 455, (3) denial of First Amendment rights.

PETITION FOR REHEARING IN BANC

COMES NOW the undersigned, on behalf of Robert J. Snyder and pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and hereby respectfully petition the full court for a rehearing in banc for the purpose of addressing the order and judgment of suspension of Robert J. Snyder entered by the Eighth Circuit Court of Appeals on April 13, 1984.

The rehearing in banc is sought upon the following grounds.

I.

That the order of suspension is based upon matters which were not a part of the Order to Show Cause issued

by the Eighth Circuit Court of Appeals, dated December 20, 1984. Accordingly, Mr. Snyder has not been accorded due process which requires: (1) Notice, (2) Opportunity to be heard, and (3) A meaningful hearing on the matters which serve as a basis for the suspension.

II.

That the Order to Show Cause advised Mr. Snyder that, pursuant to Rule 46 of the Federal Rules of Appellate Procedure he could request a hearing on his response before the full court which request was made by Mr. Snyder but was denied by Chief Judge Lay. A Motion was filed by Robert J. Snyder requesting that Chief Judge Lay not sit on the panel, which motion was denied. The opinion ordering suspension was drafted by Chief Judge Lay. It is respectfully submitted that Chief Judge Lay should have recused himself from the hearing panel and any consideration of the matter because of the provisions of 28 U.S.C. § 455.

III.

Suspension of Mr. Snyder, based upon the content of the letter dated October 6, 1983, to Helen Monteith, secretary to the Honorable Bruce M. Van Sickle would be in derogation and violation of Mr. Snyder's First Amendment rights.

ARGUMENT

This matter arises from a situation where Mr. Snyder was appointed to represent an indigent in the South-

western Division in the District of North Dakota in 1983. Mr. Snyder submitted his vouchers for payment which were returned for additional information on several occasions by the Circuit Court. As a result of his difficulty regarding submission of his vouchers, Mr. Snyder spoke with Helen F. Montieth who suggested to Mr. Snyder that he write a letter to her office stating his concerns regarding the frustration of counsel in representing indigent defendants and being compensated for it. (See Affidavit of Helen F. Monteith attached hereto as Exhibit A.) Helen F. Monteith then showed the letter to Judge Bruce M. Van Sickle and, at his direction, she sent it on to the Circuit Court. Judge Van Sickle did, in fact, review the letter and discussed the letter with Mr. Snyder. (See Judge Van Sickle Affidavit attached hereto as Exhibit B). Judge Van Sickle did not view the letter as one of disrespect for the court but rather one of a somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process. Judge Van Sickle and Helen F. Monteith both share in their affidavits that they did not regard the letter as one of disrespect for the court, or as showing a disrespect for the federal court system and both state that during the period of time that Mr. Snyder has been appearing before Judge Van Sickle he has always shown the highest respect to the court system and to Judge Van Sickle.

In any event, the letter dated October 6, 1983, which is a part of the court's record in this matter was sent to the Circuit Court of Appeals. On November 3, 1983, Chief Judge Lay addressed a letter to the Honorable Bruce M. Van Sickle referencing the letter Snyder wrote to Helen F. Monteith, which letter is also a part of the record

in this case, which letter contained statements of Chief Judge Lay that:

> [I] consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts....

The letter continued by stating:

> [I] question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an Order to Show Cause as to why he should not be suspended from practicing in any federal court in this district for a period of one year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made....

Chief Judge Lay, on December 20, 1983, did issue an Order to Show Cause which Order to Show Cause specifically stated:

> [H]e is hereby ordered to show cause within thirty (30) days of this order as to why he should not be suspended from practice in the federal district court, as well as in the United States Court of Appeals for the Eighth Circuit, for such period of time as his refusal to serve continues. Pursuant to Rule 46 of the Federal Rules of Appellate Procedure, Mr. Snyder may request a hearing on his response before the full court.

The Order to Show Cause thus directed Mr. Snyder to show cause why he should not be suspended from the

practice because of his refusal to serve as a lawyer representing indigents in the district of North Dakota. As a result of that specific directive, Mr. Snyder prepared a lengthy response which response included copies of the Criminal Justice Act for the District of North Dakota which had previously been approved by the Eighth Circuit Court of Appeals, showing that under the provisions of that act and its implementation that his stated refusal to serve as counsel for indigents from that time forward was allowed by the plan and, in fact, the statistics indicated that approximately 200 of some 275 lawyers in the Southwestern District of North Dakota had also, for various reasons, chosen not to serve on the panel. Mr. Snyder also requested a hearing before the full court as he had been advised in the Order to Show Cause that he could do.

A hearing was scheduled, but not before the full court, but before a three judge panel which included Judge Heaney, Judge Arnold and Judge Lay. Mr. Snyder upon being advised that the panel included Chief Judge Lay did enter a demand that Chief Judge Lay recuse himself because of his involvement in the matter through letters to the federal judges in the District of North Dakota and, specifically, the letter of November 3, 1983, to the Honorable Bruce M. Van Sickle, portions of which have been quoted above.

The hearing was held in St. Paul on February 16, 1983, at which time and date Mr. Snyder appeared pro se but was accompanied by an attorney who was directed by the Burleigh County Bar Association to file a Resolution of the Burleigh County Bar Association with the court

which is a part of the court's file in this matter. A copy of the Bar's Resolution is attached hereto and made a part hereof as Exhibit C.

The Return which was filed by Mr. Snyder was in direct response to the Order to Show Cause and explained the basis and reason that Mr. Snyder should not be suspended for having determined that he would not serve on the panel for indigent defendants. Nothing was included in the return regarding Mr. Snyder's guaranteed First Amendment rights of free speech, because the Order to Show Cause did not mention or direct that he show cause why he should not be suspended because of the content of the letter to Helen Monteith, dated October 6, 1983.

At the hearing on February 6, 1984, the bulk of the discussion centered on the content of the letter to Helen Monteith, dated October 6, 1983. The panel did indicate that their review of the North Dakota District Plan indicated that some revision was required.

At the conclusion of the hearing, the panel advised Mr. Snyder that he would be suspended from the practice in the federal courts unless, within ten (10) days, he submitted a letter to the court indicating that: 1. He would agree to serve on the panel under a newly revised plan, and 2. That when so serving he would comply with the guidelines in effect for the submission of billings for his services, and 3. That he retract or apologize for the language contained in the October 6, 1983, letter to Helen Monteith.

Mr. Snyder has agreed to items 1 and 2 and has sent such a letter to the court; however, he has refused to retract or apologize for the remarks in the letter.

Accordingly, on April 13, 1984, Chief Judge Lay authored an opinion for the panel which states at page 6 thereof:

> We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six (6) months; thereafter Snyder should make application to both this court and the Federal District Court of North Dakota to be readmitted.

It is respectfully submitted that the Order of Suspension should not be entered for various reasons which have been itemized above and which will be amplified upon hereafter.

In the first place, the Order to Show Cause specifically stated that he was to show cause why he should not be suspended from the practice "[F]or such period of time as his refusal to serve continues. . . ." In the opinion issued by the Circuit Court Panel, it is stated that Snyder was ordered to show cause why he should not be suspended from practice in the federal courts and the opinion states:

> Attorney Snyder has been cited:
>
> (1) For his refusal to continue to perform services in indigent cases under the Criminal Justice Act (CJA) 18 U.S.C. § 3006A (1982); and
>
> (2) For his disrespectful refusal to comply with the guidelines under the CJA relating to the submission of expenses and attorney's fees.

It is apparent that the above quoted language in the Order of Suspension is vastly different than the directive in the Order to Show Cause. Additionally, it is clear from the language in the opinion that the basis for the

court's ordering the suspension of Snyder was for his refusal to "Offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October 6th." (Page 3.) And, at page 6 of the opinion it is stated that "without hesitation we find Snyder's disrespectful statements as to this court's administration of CJA contumacious conduct." It then follows, in the next paragraph, that he is ordered suspended.

It is Snyder's position that he has been denied due process in that the Order to Show Cause was not directed to the language contained in the letter and, therefore in his Return to the Order to Show Cause he made no reference to it nor argument in respect to it. Had the Order to Show Cause stated that he was to show cause why he should not be suspended from practice because of the statements contained in the letter the Return to the Order to Show Cause would have referenced the First Amendment to the Constitution and the numerous decisions regarding freedom of speech.

Accordingly, it is respectfully submitted that Snyder has now been suspended because of the content of the letter without having had the due process of law because as to the content of the letter he has not been afforded: (1) Proper notice, (2) Opportunity to be heard, and (3) A meaningful hearing. He was not advised in the Order to Show Cause that the matters contained in the letter were to serve as the basis for a possible suspension and, therefore, he did not have an opportunity to appropriately respond.

Additionally, it is respectfully submitted that Chief Judge Lay should have recused himself in the considera-

tion of this matter because of the provisions of 28 U.S.C. § 455 which state in pertinent part as follows:

> Disqualification of justice, judge, magistrate or referee in bankruptcy.
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> a. Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

The language of that statute is also a part of Canon 3C. of the Model Rules of Professional Conduct and Code of Judicial Conduct which states in pertinent part as follows:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, included but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings; . . .

It is respectfully submitted that Judge Lay's initial involvement in the matter before the issuance of the Order to Show Cause does bring into play the provisions of 28 U.S.C. § 455 because he did have personal knowledge of facts concerning the proceeding.

Snyder did request that Chief Judge Lay recuse himself, however, Chief Judge Lay did not recuse himself and, in fact, sat as the Chief Judge of the panel and, subsequently, wrote the opinion suspending Mr. Snyder for a period of six (6) months.

In Chief Judge Lay's letter to the Honorable Bruce M. Van Sickle of November 3, 1983, he stated that he was going to issue an Order to Show Cause why Snyder should not be suspended "[F]or a period of one year."

It is, therefore, respectfully submitted that Chief Judge Lay should have recused himself from any consideration of this matter and that his failure to do so is sufficient basis for a rehearing in banc and the subsequent dismissal of the proceeding against Mr. Snyder.

Additionally, it is respectfully submitted that the Order of Suspension should be set aside because to order his suspension because of the language in the letter to Helen Monteith would violate his First Amendment rights.

It is apparent from the decision that the suspension of Mr. Snyder is entered not on the grounds set forth in the Order to Show Cause, but because of the language contained in the October 6, 1983, letter to Helen Monteith. It is respectfully submitted that, since that is the basis of suspension, it is necessary to address the First Amendment Freedom of Speech rights that lawyers and all other persons are entitled to under the First Amendment to the Constitution. In the October 6, 1983, letter all Mr. Snyder did was complain to the federal district court secretary about problems he had encountered in his representation of indigents in the court, which letter was written at the secretary's suggestion. The letter simply vents frustra-

tion of a practicing attorney towards a system which has not been working particularly well.

Additionally, and more importantly, it is respectfully submitted that, under the First Amendment, Mr. Snyder had the right to say what he said in the October 6th letter without fear of reprisal. The cases dealing with the subject of First Amendment rights make clear that truthful criticism is protected by the First Amendment, subject to regulation only to the extent that it presents a clear and imminent threat to the fair administration of justice or involves conduct disruptive of a judicial proceeding. See *Craig v. Harney,* 331 U.S. 367 (1947); *Pennekamp v. Florida,* 328 U.S. 331 (1946); *Bridges v. California,* 314 U.S. 352 (1940); and *Polk v. State Bar of Texas,* 374 F. Supp. 784 (N.D. Tex. 1974).

Regarding the constitutional standard applicable to the regulation of a lawyers extra judicial criticism of the judiciary, the Supreme Court in *Bridges* explained that clear and present danger "[I]s a working principle that the substance of evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." (314 U.S. at 263). (See also: In re: Hinds, 449 A.2d 483 (N.J. 1983)).

A private letter written to the local federal district court judge's secretary simply does not rise to the level that it can be said to be an imminent threat to the fair administration of justice or disruptive of a judicial proceeding.

Therefore, it is respectfully requested that on the grounds and for the reasons above stated it is appropriate that a rehearing be held in the captioned action in banc.

Dated this 20th day of April, 1984.

Respectfully submitted,

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McDonald & Johnson
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By: /s/ David L. Peterson
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By: /s/ John C. Kapsner
John C. Kapsner

EXHIBIT "A"

AFFIDAVIT

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

I, Helen F. Monteith, being first duly sworn, state:

1. That Mr. Robert J. Snyder represented an indigent defendant before Judge Bruce M. Van Sickle in 1983, and experienced difficulty in the processing of his voucher.

2. Mr. Snyder called this office and told me of his difficulty. I suggested he write a letter to this office stating his concerns regarding the frustration of counsel in representing indigent defendants, and being compensated for it.

3. He sent a letter which I showed to Judge Van Sickle, and at the Judge's direction sent it on to the Circuit Court.

4. I have known Mr. Snyder for a number of years. He has always been willing to accept his share and more of the indigent defense cases in the Southwestern Division of the District of North Dakota, and I believe he did not intend to show disrespect for the federal court system.

Bismarck, North Dakota this 19th day of April, 1984.

/s/ Helen F. Monteith

Helen F. Monteith

Subscribed and sworn to before me this 19th day of April, 1984.

/s/ Jacquelin Beaudoin
Jacquelin Beaudoin, Notary Public
Burleigh County, North Dakota

My commission expires: 12/10/88

EXHIBIT "B"

AFFIDAVIT

I, Bruce M. Van Sickle, United States District Judge, District of North Dakota, state:

1. That Mr. Robert J. Snyder represented indigents before me on a number of occasions.

2. That in 1983 he was involved in representing an indigent defendant, and experienced problems in processing his voucher.

3. That Mr. Snyder sent my office a letter protesting his difficulties.

4. I discussed the letter with Mr. Snyder. My concern was the protest over the fee schedule, and his protest over the paper work required.

5. I did not view the letter as one of disrespect for the Court, but rather one of a somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process.

6. Mr. Snyder has appeared before me on a number of occasions and has always competently represented his client, and has shown the highest respect to the court system and to me.

Bismarck, North Dakota this 19th day of April, 1984.

/s/ Bruce M. Van Sickle
Bruce M. Van Sickle, Judge
United States District Court

EXHIBIT "C"

RESOLUTION

WHEREAS, Robert Snyder has been a member of the Burleigh County Bar Association since he and his two partners opened their practice in Bismarck, North Dakota, in 1977, following graduation from law school; and

WHEREAS, since that time Robert Snyder has developed his practice and enjoys the respect of the entire membership of the Burleigh County Bar Association, and is recognized as a hard-working, well-qualified, ethical attorney, who is a credit to the legal profession in Burleigh County and the State of North Dakota; and

WHEREAS, during the same period of time Robert Snyder has involved himself in community activities which are a credit to him individually, and also reflect positively on the legal profession in this community; and

WHEREAS, Robert Snyder has been on a panel of attorneys who are called upon to defend indigents in Federal District Court in the Southwestern Division of the District of North Dakota, and that between January, 1980 and December, 1983, out of 99 indigent appointments, Robert Snyder has personally accepted 8 of the appointments, and his two partners have accepted an additional 7 indigent appointments, for a total of 15 indigent appointments, or more than 15% of the appointments in all indigent cases handled in the Southwestern Division during the three year period; and

WHEREAS, there are approximately 276 licensed non-corporate and non-government private practitioners practicing law in the Southwestern Division of the District of North Dakota; and

WHEREAS, the Criminal Justice Act plan for the district of North Dakota presently in effect as approved by the Eighth Circuit Court of Appeals provides that the panel shall include lawyers who ". . . are competent to give adequate representation to parties under the Act, and are willing to serve." And,

WHEREAS, the panel of attorneys for the Southwestern Division of the District of North Dakota currently on file under the Act only has 87 of the approximately 276 licensed practitioners included thereon, which makes it clear that only approximately 31% of those licensed

practitioners eligible for appointment have indicated that they ". . . are willing to serve". And,

WHEREAS, the Burleigh County Bar Association has been advised that Robert Snyder has requested that his name be removed from the Criminal Justice Act panel of attorneys, and that as a result of that request, he has been ordered to show cause in the Eighth Circuit Court of Appeals why he should not be suspended from practice in the Federal District Court in North Dakota as well as in the United States Court of Appeals for the Eighth Circuit for such period of time as his refusal to serve continues; and

WHEREAS, in March, 1982, at a meeting of the Federal Practice Committee, the Federal District Court for North Dakota appointed a subcommittee to review the problems with the Criminal Justice Act appointment system within the District of North Dakota; and

WHEREAS, the Burleigh County Bar Association recognizes and believes that the current system places an undue burden upon some practitioners and other practitioners are not called upon in any manner for service to the indigents; and

WHEREAS, the record reflects that Robert Snyder and his lawfirm have accepted appointment to represent 15% of the cases where counsel have been appointed for indigents in the Southwestern District of the District of North Dakota between January, 1980 and December, 1983, the Burleigh County Bar Association believes that Robert Snyder has fulfilled in a more than satisfactory manner his obligations as a member of the Bar; and

WHEREAS, at least 69% of the licensed practitioners in the Southwestern District of the District of North Dakota have chosen not to serve as counsel for the indigents by not having their names included on the panel of lawyers available for appointment as allowed under the current Criminal Justice Act plan, and no disciplinary action has been commenced against any of said lawyers.

NOW, THEREFORE, BE IT RESOLVED that the Burleigh County Bar Association urges that the Eighth Circuit Court of Appeals not issue an order suspending Robert Snyder from practice in the Federal District Court for North Dakota and the Eighth Circuit Court of Appeals, because the Burleigh County Bar Association believes that Robert Snyder is a credit to the legal profession, and that the record above outlined reflects that he has shouldered more than his fair share of the cases involving indigent criminal defendants, and the Burleigh County Bar Association believes that the Criminal Justice Act plan should be reviewed and revised, and that the roll of attorneys should be revised and updated so that the burden and responsibility of defending indigents can be more evenly distributed among all members of the Bar.

Said Resolution to be filed with the Eighth Circuit Court of Appeals on behalf of Robert Snyder.

Dated this 15th day of February, 1984.

Burleigh County Bar Association

By /s/ Jo Wheeler Johnson
Jo Wheeler Johnson, President

Attest:
/s/ William Severin
William Sevein, Secretary

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-8017

In the Matter of:) On Petition for
Attorney Robert J. Snyder) Rehearing En Banc.

Filed: May 31, 1984

ORDER DENYING PETITION FOR REHEARING EN BANC

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges.

HEANEY, Circuit Judge.

This matter comes before the Court on a petition for rehearing en banc. Attorney Snyder, now represented by counsel, raises several points in his petition: (1) that Chief Judge Lay should recuse himself under 28 U.S.C. § 455(b)(1) because of his personal knowledge of facts gained under the Criminal Justice Act (CJA); (2) that Snyder was not given proper notice that his allegedly disrespectful letter could be a basis for discipline; (3) that Snyder's letter of complaint was an exercise of free speech protected by the First Amendment; (4) that his letter was not disrespectful; and (5) that the district court and the court secretary encouraged Mr. Snyder in directing that the letter of complaint be sent.

Before dealing with these arguments, we think it wise to state the facts more precisely. Robert Snyder was

appointed by the United States District Court for the District of North Dakota to represent 12 defendants in a period from January 1, 1979 to early 1984. It appears from the record that eight of these cases were disposed of without trial and four involved at least some court appearances. According to the records that have been furnished to this Court, Mr. Snyder devoted approximately 270 hours to these cases over a four and one-half year period.

On August 9, 1983, Mr. Snyder completed work on a case in which he had been appointed to represent an indigent, and submitted a voucher in the sum of $1,898.55 to the district court for payment. Judge Bruce Van Sickle reduced the claim by $102.50 and forwarded this voucher to this Court on August 17. On September 6 this Court returned the voucher to Mr. Snyder requesting him to submit a detailed memorandum pursuant to 22.2 B of the guidelines, and to support his claim for long distance calls by attaching an itemized statement. The voucher was returned to us on September 26, but because he did not have both the number of hours expended as well as the dollar amounts, requested by the guidelines, it was returned by this Court to Mr. Snyder on the same date. On October 20, the completed voucher was returned to this Court. Included in the return was Mr. Snyder's letter of October 6; this letter is attached hereto as Addendum No. 1. The letter stated in part:

> We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.
>
> Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you

are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

On November 3, 1983, Chief Judge Lay wrote to Judge Van Sickle the letter which is attached hereto as Addendum No. 2. A copy of this letter was sent to Mr. Snyder. In that letter Chief Judge Lay stated in part:

> I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts.
>
> • • • •
>
> Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be appointed to represent indigent criminal defendants. As far as the court is concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practicing in any federal court in this circuit for a period of one year. This suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made.

On December 20, 1983, Chief Judge Lay caused to be issued the order to show cause which forms the basis of the present proceedings. A hearing on the order to show

cause was held on February 15, 1983. At the hearing to show cause, Judge Richard Arnold read excerpts of Snyder's letter of October 6 to Mr. Snyder and asked Mr. Snyder the following question: "I am asking you sir if you are prepared to apologize to the Court for the tone of your letter." Mr. Snyder responded as follows: "That is not the basis that I am being brought forth before the Court today. It is not an apology and I could have apologized when an apology was demanded from Judge Lay and I declined • • • but I did not apologize then and I am not apologizing now." Judge Arnold stated to Mr. Snyder: "I just want to get this clear that you are declining to apologize for the letter of October 6." Snyder said: "I am." At the close of the hearing the Court gave Mr. Snyder an additional ten days in which to state that he was willing and ready to represent indigent defendants, that he would comply with the guidelines, and that he would apologize to the Court for his letter of October 6.

On February 22, Snyder wrote to this Court stating:

> If and when a new Plan for the implementation of the Criminal Justice Act in the State of North Dakota is enacted, the undersigned will enthusiastically obey its mandates, just as he has obeyed the mandates, or lack thereof, in the existing Plan.
>
> Further, the undersigned states that he will make every good faith effort possible to comply with the Court's guidelines regarding the payment of attorney's fees and expenses. [See Addendum No. 3.]

No apology for the October 6 letter was made. Thereafter, on February 24, 1984, Chief Judge Lay wrote to Mr. Snyder giving him another opportunity to apologize. He stated: "I am confident that if such a letter is forthcoming

that the Court will dissolve the order." See Addendum No. 4.

Mr. Snyder responded as follows:

> I am in receipt of your letter dated February 24, 1984. Please be advised that my letter of February 22, 1984 entirely states my position concerning this matter.
>
> I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. You must therefore search your conscience and determine what course of action will best serve the interest of justice and the administration of the Eighth Circuit.
>
> It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on principle, one must be willing to accept the consequences.
>
> Thank you for your time and attention.

We turn now to the arguments raised by Snyder on his petition for rehearing en banc. We deal with them seriatim.

First, it is clear that a judicial officer is not disqualified under 28 U.S.C. § 455 because of personal knowledge of facts unless the knowledge arises out of extra-judicial observation or misconduct. See United States v. Coven, 662 F.2d 162, 168 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982). Chief Judge Lay, in processing Snyder's claim and in seeking information to process the claim, was carrying out his judicial responsibilities. Any factual information gained in doing so or any judicial action taken by him as chief judge did not in any way arise, in an extra-judicial capacity. Chief Judge Lay possesses no personal bias against Snyder and properly served on the panel to hear Mr. Snyder's response to the Court's show cause order.

Second, it is abundantly clear from the record that Snyder had notice that his disrespectful letter could be a basis for discipline. Snyder was given at least three opportunities to apologize for the letter and declined to do so.

Third, Snyder's counsel states that Mr. Snyder's letter was an exercise of free speech. Snyder urges that he should not be disciplined for exercising his First Amendment rights to criticize, and express frustration toward, the Court. The gravamen of the situation is that Snyder in his letter became harsh and disrespectful to the Court. It is one thing for a lawyer to complain factually to the Court, it is another for counsel to be disrespectful in doing so.

It is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech. As Justice Stewart stated: "Obedience to official precepts may require abstention from what in other circumstances might be constitutionally protected speech." In re Sawyer, 360 U.S. 622, 646-647 (1959) (Stewart, J., concurring).[1]

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1. See also State v. Nelson, 504 P.2d 211, 214 (Kan. 1972), which states:

(Continued on next page)

Fourth, Snyder states that his letter is not disrespectful. We disagree. In our view, the letter speaks for itself.

Snyder seeks to mitigate his conduct by stating that the district court and the district court's secretary directed that the letter be sent. It appears from the affidavit of Judge Bruce Van Sickle that he was aware of Mr. Snyder's letter to his secretary and viewed it as that of a frustrated lawyer hoping that his comments with respect to the fee schedule and the paperwork would serve as a basis for some change in the process. There is nothing in the record to indicate that Judge Van Sickle instructed Mr. Snyder to be disrespectful to this Court. Snyder wrote the letter, he is intelligent and capable of independently evaluating the ramifications of his conduct, and he must take responsibility for his own actions.

We have difficulty with the proposition that we should condone, or that anyone should approve, a lawyer's exercise of open disrespect for the court before which the lawyer practices. To repeat what we have earlier observed, "a display of insolence and disrespect to [the Court] is an insult to the majesty of the law itself." In the Matter of: Attorney Robert J. Snyder, No. 84-8017, slip op. at 6 n.6 (8th Cir. April 13, 1984). However, because of Snyder's past cooperation with the district court

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(Continued from previous page)

Concerning respondent's argument that DR 1-102 (A) (5) creates an impermissible and chilling effect on "First Amendment freedoms," an examination of decisions on the point (12 A.L.R.3d, Anno., p. 1408) reveals the concensus to be that an attorney's right to free speech is tempered by his obligation to both the courts and the bar, an obligation to which ordinary citizens are not held.

in serving on pro bono matters, because of his now professed willingness to continue to do so and to comply with the CJA guidelines, and because of the alleged misunderstanding as to the reasons for his suspension—we conditionally vacate the panel's order of suspension and provide an additional 10 days from the date of this order for Attorney Snyder to provide a sincere letter of apology to this Court for the disrespectful comments directed to the Court in his letter of October 6, 1983, sent to Judge Van Sickle's secretary. The clerk is directed that if Snyder fails to comply with this request, our original order of suspension will be reinstated with the six month suspension to run from the date of the original order. The Clerk is further directed to send a copy of this order to each of the lawyers who signed the petition for rehearing en banc and to the president and secretary of the Burleigh County Bar Association.

The petition for rehearing en banc is denied on the ground that the majority of judges in regular active service did not vote to grant the petition as required by Fed. R. App. P. 35.

BRIGHT and McMILLIAN, Circuit Judges, would grant the petition for rehearing en banc.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

ADDENDUM NO. 1

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October 6, 1983

Helen Monteith
Federal Building
3rd Street & Rosser Avenue
Bismarck, ND 58501

Re: United States of America vs. Dennis Warren

Dear Helen:

I am in receipt of the letter of September 26, 1983, from the Eighth Circuit Court of Appeals, in which our latest attempt to justify our time and expenses for Dennis Warren has again been set back. This letter is for the purpose of responding to that letter.

In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to

go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

Thank you for your time and attention.

Very truly yours,

BICKLE, COLES AND SNYDER, CHARTERED

/s/ Robert J. Snyder
Robert J. Snyder
Attorney at Law

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18 U.S.C. §3006A(d)(1-4) (1982) provides:

(d) *Payment for representation*

(1) Hourly rate.—Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the

Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts.—For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged, and $400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $250 for each attorney in each proceeding in each court.

(3) Waiving maximum amounts.—Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims.—A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supportd by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate, the district court, or an appellate court, claims shall be submitted to the District Court which shall fix the compensation and reimbursement to be paid.

Pertinent Excerpts from *Guidelines for the Administration of the Criminal Justice Act,* Ch. 2 § 3 (2.22, 2.27), Vol. VII, Guide to Judiciary Policies and Procedures

2.22 Limitations.

A. *Hourly Rates.* Counsel may be compensated at rates not exceeding $30 per hour for time expended in

court or before a United States magistrate and $20 per hour for time reasonably expended out of court. The hourly rates of compensation are designated and intended to be maximum rates and to be treated as such. In each district court, counsel claiming in execess of $750 shall attach to the CJA voucher a memorandum detailing the services provided. The memorandum shall be in both narrative and statistical form and provide justification for hours spent. Whenever warranted by the circumstances of the case, counsel claiming less than $750 in a district court, and counsel claiming any amount in a court of appeals, may be required by the presiding judicial officer to submit a memorandum supporting and justifying the compensation claimed.

B. *Maximum Compensation.*

1. *Preliminary Proceedings and Proceedings Before a United States District Court.* Compensation (exclusive of allowable expenses) is limited to $1,000 for each attorney in a case in which one or more felonies are charged, to $400 for each attorney in a case in which only misdemeanors are charged in preliminary proceedings and proceedings before a United States district court, and to $250 for each attorney in connection with a post-trial motion made after entry of judgment, or in a probation or parole revocation or parole termination proceeding, or for representation as provided under Subsection (g). If a case is disposed of at an offense level lower than the offense originally charged, the compensation maximum is determined by the higher offense level. In capital cases or in other difficult cases in which the court finds it necessary to appoint more than one attorney, the limita-

tions apply to each attorney. Payments in excess of these limitations may be made to provide fair compensation in cases involving extended or complex representation when so certified by a United States district judge or magistrate, as applicable, and approved by the Chief Judge of the United States Court of Appeals. The finding of the court that the appointment of an additional attorney in a difficult case was necessary and in the interest of justice shall appear on the Order of Appointment.

Counsel claiming payment in excess of the statutory maximum shall submit with his voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation. Upon preliminary approval of such claim by the district court, the court should furnish to the chief judge of the circuit a memorandum containing his recommendations and a detailed statement of reasons.

In determining if an excess payment is warranted, the district court judge and the chief judge of the Circuit should make a threshold determination as to whether the case is either extended or complex. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex". If more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings, the case is "extended."

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The

following criteria, among others, may be useful in this regard: responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed; knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and injury thereto; any extraordinary pressure of time or other factors under which services were rendered; and any other circumstances relevant and material to a determination of a fair and reasonable fee.

2. *Proceedings in Courts of Appeals.* The $1,000 limitation applies to the compensation payable for each attorney in an appellate court, including the district court on appeals from a magistrate's judgment. Appeals of post-trial motions, revocations of probation or parole, or other representation under Subsection (g) of the Act are subject to the $250 limitation for each attorney as provided in the last sentence of Subsection (d) (2) of the Act. Payment in excess of these limitations may be made to provide fair compensation in cases involving extended or complex representation when so certified by the court and approved by the Chief Judge of the Circuit.

C. *Reduction of CJA Compensation Vouchers by the Reviewing Judicial Officer.* The Criminal Justice Act provides that the reviewing judicial officer shall fix the compensation and reimbursement to be paid to appointed counsel. In cases where the amount approved is less than was requested by appointed counsel, the judicial officer may wish to notify appointed counsel that his or her claim for compensation and/or reimbursement has been reduced, and to provide an explanation for the reasons for the reduction.

D. *Payments by a Defendant Under Subsection (f) of the Act.* No appointed attorney shall accept a payment from or on behalf of the person represented without authorization by a United States district or circuit judge or magistrate on CJA Form 7. If such payment is authorized, it shall be deducted from the fee to be approved by the court under Subsection (d) of the Act. In this regard, the combined payment to any one attorney for compensation from both the person represented and the Government shall be subject to applicable dollar limitations, unless excess compensation is approved under Subsection (d)(3) of the Act. Whenever the court finds that funds are available for payment from or on behalf of a person represented and directs that such funds be paid to the court for deposit in the Treasury, a check or money order drawn to the order of the Administrative Office of the United States Courts should be transmitted by the clerk of court to the Administrative Office together with completed CJA Form 7. The collections which are for deposit to the credit of the CJA appropriation will be processed by and included in the account of the Disbursing Officer of the Administrative Office. Subsection (f) of the Act does not authorize a judicial officer to require reimbursement as a condition of probation.

E. *Services Before United States Magistrates.* Magistrates may only approve vouchers for services rendered in connection with a case disposed of entirely before the magistrate.

2.27 Reimbursable Out-of-Pocket Expenses. Out-of-pocket expenses reasonably incurred may be claimed on the voucher, and must be itemized and reasonably documented. Expenses for investigations or other services un-

der Subsection (e) of the Act shall not be considered out-of-pocket expenses.

A. *Reimbursement for Transcripts.* The cost of court authorized transcripts may be claimed as a reimbursable expense, as provided for in Subsection (d)(1) of the Criminal Justice Act (but see paragraph 3.12 of these Guidelines). Claims for reimbursement for payments for transcripts authorized by the court should be submitted on CJA Form 24. (See Appendix A) The cost of transcribing depositions in criminal cases is the responsibility of the Department of Justice pursuant to Rule 17b of Fed. R. Crim. P. (but when a witness is an expert, then the Administrative Office will pay out of CJA funds) (39 Comp.Gen.133 (1959)).

B. *Travel Expenses.* Travel by privately owned automobile should be claimed at the rate currently prescribed for Federal judiciary employees who use a private automobile for conduct of official business, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis.

Per diem in lieu of subsistence is not allowable, since the Act provides for reimbursement of expenses actually incurred. Therefore, counsel's expenses for meals and lodging incurred in the representation of the defendant would constitute reimbursable "out-of-pocket" expenses. In determining whether actual expenses incurred are "reasonable," counsel should be guided by the prevailing limitations placed upon travel and subsistence expenses of Federal judiciary employees in accordance with existing government travel regulations.

C. *Interim Reimbursement for Expenses.* Where it is considered necessary and appropriate in a specific case, the presiding judge or magistrate may, in consultation with the Administrative Office, arrange for interim reimbursement to counsel of extraordinary and substantial expenses incurred in providing representation in a case.

D. *Other.* This would include items such as telephone toll calls, telegrams, copying (except printing—see paragraph 2.28 D below) and photographs.

No. 84-310

In the Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:

Attorney Robert J. Snyder

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 84-310

In the Supreme Court of the United States

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BRIEF OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PROVISIONS OF CONSTITUTION, STATUTES AND RULES INVOLVED

In addition to the First and Fifth Amendments to the United States Constitution cited by petitioner (see Petitioner's Brief 1), the United States Court of Appeals for the Eighth Circuit believes the following statutes and regulations are involved.

1. 18 U.S.C. §3006A(d)(1-4) (1982).

2. *Guidelines for the Administration of the Criminal Justice Act*, ch. 2, §3 (2.22, 2.27), Vol. VII, Guide to Judiciary Policies and Procedures.

STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Rules of the Supreme Court, this Statement of the Case is submitted to correct material omissions and inaccuracies in the Statement set forth in petitioner's brief. It is uncontroverted that petitioner's claim for compensation and reimbursement submitted to Chief Judge Lay pursuant to 18 U.S.C. §3006A(d) of the Criminal Justice Act did not comply with the applicable guidelines. In his initial submission, petitioner failed to attach a detailed memorandum detailing and justifying his legal services.[1] Petitioner's voucher was returned with a request that he provide more information. (J.A. 2.) Petitioner responded to the request for further information by writing a letter dated September 20 to which he attached billing records. (J.A. 3.) As his handwritten note on his September 20 letter indicates, the amounts listed on his billing records do not correspond with the hourly rates provided by the Criminal Justice Act. Neither did the billing disclose the actual hours spent by petitioner in the rendering of legal services nor an itemized list of his long distance phone calls. On September 26, 1983, June Boadwine, administrative assistant to Chief Judge Lay, returned petitioner's voucher and billing records due to his non-compliance. (J.A. 13.) After thus failing twice to comply with the applicable guidelines, petitioner wrote his letter of October 6, 1983. (J.A. 14-15.) Although addressed to the secretary of the district court, petitioner states in the first paragraph of his letter that he is in receipt of the letter from the Court of Appeals

1. Petitioner had requested $1,898.55 for compensation and reimbursement. (J.A. 1.) Judge Van Sickle had approved payment in the amount of $1,796.05. (J.A. 1.) Amounts claimed in excess of $1,000 must be approved by the chief judge of the circuit. 18 U.S.C. §3006A(d)(3) (1982).

of September 26, 1983, and that he is writing for the purpose of responding to that letter.

Petitioner fails to point out in his Statement of the Case that Chief Judge Lay, in his letter of November 3, 1983, to Judge Van Sickle—of which petitioner received a copy—wrote as follows: "Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, my concern now is related to the *apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it.*" (J.A. 16.) (Emphasis added.) On November 15, 1983, Chief Judge Lay wrote Judge Van Sickle again and indicated, *inter alia,* that if Mr. Snyder wishes to write the Court and offer his apology to the Court for his disrespectful comments, he would be willing to recommend to the Court that an order to show cause not be filed. (J.A. 19.) On December 12, 1983, Judge Van Sickle informed Chief Judge Lay that Mr. Snyder had decided not to apologize. (J.A. 20.) Subsequently, on December 22, an Order to Show Cause was filed. (J.A. 21-23.) In the show cause order, Chief Judge Lay, on behalf of the Court, notes that Mr. Snyder has refused to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorney fees in addition to refusing to represent criminal indigent defendants. In view of these refusals "to carry out his obligations as a practicing lawyer and as an officer of this court," petitioner was ordered to show cause why he should not be suspended from the federal courts of the Eighth Circuit for such period of time as his refusal to serve continues. (J.A. 22.)

Petitioner prepared a Return to the Order to Show Cause which was filed on January 16, 1984. (J.A. 23-31.) Petitioner does not mention in his Statement of the Case

that he acknowledged in his Return that the present proceeding was initiated by the letter of October 6, 1983, and that had the letter not been sent, this proceeding would not be taking place.

The hearing on the Order to Show Cause was held on February 16, 1984. Petitioner was given an opportunity at the hearing to apologize for his October 6 letter. He refused to do so and added: "If I am suspended I can tell you that the situation in Bismarck will become worse than it already is, because I don't think you are going to find anybody that will take a case." (J.A. 44.)

In his Statement, petitioner argues that certain comments made by the Court at the show cause hearing support his position that he was not given proper notice of the grounds for his suspension. (Petitioner's Brief 7-13.) The Eighth Circuit disputes the contention that petitioner was not given proper notice and addresses it in the body of its brief.

On February 24, 1984, Chief Judge Lay wrote petitioner giving him yet another opportunity to apologize. (J.A. 52-53.) Petitioner responded by letter dated February 27 and indicated that he would never apologize, invited the Court to do whatever it felt it had to do, and intimated that he would accept the consequences of whatever the Court's actions would be. (J.A. 53-54.)

SUMMARY OF ARGUMENT

Petitioner was disciplined for his disrespectful refusal to comply with the relevant guidelines for the judicial administration of the Criminal Justice Act. Such refusal was tantamount to disobeying a court order and directly interfered with the Court's ability to carry out its duties and to administer justice.

Petitioner had proper notice that the Court of Appeals was concerned about his disrespectful and defiant refusal to comply with the applicable guidelines. Petitioner has acknowledged this fact in his brief (p. 40) and in his Return to the Order to Show Cause. (J.A. 25.) In any event, the adamant refusal of petitioner to apologize renders any remand for hearing pointless.

ARGUMENT

I. PETITIONER'S RIGHT TO FREE SPEECH HAS NOT BEEN VIOLATED.

The first question presented for review is whether the Eighth Circuit Court of Appeals has violated petitioner's First Amendment rights. Petitioner advances two arguments: 1) that he has been denied his right to free expression and 2) that Rule 46(c) of the Federal Rules of Appellate Procedure is unconstitutionally overbroad and vague. Both arguments advanced by petitioner are without merit as he has mischaracterized and ignored the true basis for his suspension.

A. Petitioner Was Properly Suspended for His Disrespectful Refusal to Comply With the Applicable Guidelines Under the Criminal Justice Act.

Petitioner claims that the imposition of a six-month suspension by the Eighth Circuit Court of Appeals has impermissibly circumscribed his right to free speech. Characterizing his statements in the October 6 letter as criticism of the judicial system, petitioner argues that the comments do not constitute a clear and present danger to the administration of justice. (Petitioner's Brief 22, 34-35.) Petitioner's arguments fail because his underlying assumption—that he was disciplined for criticism of the judiciary and the judicial system—is not true. The Eighth Circuit Court of Appeals would be the first to admit and, indeed, champion the constitutional right of any individual to criticize the judicial system, the judiciary, and the state of the law. There is no question that such cases as *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946), and *Craig v. Harney*, 331 U.S. 367 (1947), protect the truthful criticism of the judiciary and judicial system absent a clear and imminent threat to the fair administration of justice. But such criticism is not involved here. Petitioner was disciplined for his disrespectful refusal, after request by the Court of Appeals, to comply with regulations concerning the payment of attorney fees and reimbursement of expenses under the Criminal Justice Act. As the Court of Appeals stated in its opinion filed on April 13, 1984:

> An integral part of Snyder's refusal to comply with CJA guidelines was his explicit statement of disrespect to the federal court. . . Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive. *This is not to say that courts cannot and should not be subject to proper criticism and comment; however, when an attorney becomes disrespectful in response to a court's request that counsel comply with a congressional mandate, then we deal with a different matter.* Without hesitation we find Snyder's disrespectful statements as to this court's administration of CJA [the court's request for verification] contumacious conduct.[2]

(Emphasis added.)

The judges of the Eighth Circuit have consistently maintained that petitioner's suspension was based upon his defiant and disrespectful refusal to comply with the law. In fact, petitioner was given three different opportunities to purge himself of his defiant refusal. This is the first case in the Eighth Circuit's history where an attorney has refused to comply with the request of the Court that hours and expenses be verified. (J.A. 39.) Petitioner would have this Court dispose of this matter based only on "general observations about freedom of speech." *In re Sawyer*, 360 U.S. 622, 666 (1959) (Frankfurter, J., dissenting). Of course, "[t]ime, place and circumstances determine the constitutional protection of utterance." *Id.*

When petitioner first applied for attorney fees and expenses, he failed to send any verification. He then responded to the Court's request for more information by

---

2. Petitioner was neither cited nor disciplined for his comments that he had to go through extreme gymnastics to receive the puny amounts the federal courts authorize for work performed under the Criminal Justice Act. Although those comments could properly be characterized as criticism of the law and the judicial system, petitioner did not limit his letter of October 6 to "mere criticism." Nor was petitioner disciplined for his failure to apologize, as petitioner claims. (Petitioner's Brief 19-20.) Rather, an apology by petitioner would have obviated the need for discipline. (See letter of Chief Judge Lay dated November 15, 1983, J.A. 18-19.)

filing money charges based on his office money code. The money code, as petitioner concedes, did not verify his hours expended and did not correspond with the statutory fees allowed under the Criminal Justice Act. The Court of Appeals once again returned this application to the district court with the request that petitioner verify his actual hours and expenses. Petitioner's response may be viewed as being critical of the Court; however, the Eighth Circuit has always viewed the letter as a defiant and disrespectful refusal to comply with the chief judge's request. The disrespect and defiance is contained in three phrases: 1) "I have simply had it" (for being asked twice to comply with the guidelines); 2) "I am extremely disgusted by the treatment of us by the Eighth Circuit in this case," (for being asked to comply with the law and verify his hours and expenses); and 3) ". . . I am not sending you anything else. You can take it or leave it," (his defiant refusal to comply). His suspension was based on that defiant refusal.[3] As the Eighth Circuit panel's opinion of April 13 observed, petitioner's defiant response was an integral part of his refusal to comply with the rules and regulations as requested by the Court. Petitioner's claim that the Eighth Circuit is penalizing all disrespectful speech (J.A. 26) simply ignores the Order to Show Cause and the basis for the imposition of discipline.

Petitioner's characterization that his letter was private is similarly misplaced. Surely, petitioner's response

3. Petitioner's refusal to provide further service under the Criminal Justice Act was not the cause for suspension. Petitioner said he would volunteer to serve under the Criminal Justice Act if other lawyers were required to serve as well. (J.A. 30, 35.) Although Snyder urges that his time had been unfairly taken by representing indigents under the Criminal Justice Act, eight of the twelve cases he handled from January 1, 1979, to early 1984 did not involve a trial. (J.A. 89.) In that five-year time period, he had devoted 270 hours of service under the Criminal Justice Act. (J.A. 89.)

to the Court, although mailed to the district court secretary, cannot be considered private mail. The Court made its request through the district court, the district court acted through the judge's secretary, and the district court relayed the request of the Court of Appeals to petitioner. His letter of October 6, as petitioner admits in the letter, was in direct response to the Court's request.

Petitioner attempts to obviate the true reason for his suspension by arguing that the Court could not possibly have suspended him for failing to provide proper support for his fees because the Court denied his claim for excess attorney fees and unitemized expenses. (Petitioner's Brief 19.) This is plainly not the case. The denial of excess fees and expenses did not purge Snyder of his defiant and disrespectful action. The following hypothetical illustrates this point. Assume an appellate court has a rule that limits briefs to 50 printed pages. The party files an appellate brief of 100 pages. The Court rejects the brief and requests the attorney to file a brief in accord with the rule. The attorney writes back and says:

> The rule is ridiculous. I have simply had it. I am extremely disgusted with the treatment of me by the Court. I am not sending you anything else. You can take it or leave it.

The Court strikes the brief. It also requests the attorney to show cause why he should not be suspended for his disrespectful defiance in refusing to adhere to the Court's request that he comply with the rule. After hearing the Court requests that the attorney issue an apology for his disrespectful letter in refusing to comply with the rule. He refuses, and the Court suspends him. Clearly, the fact that the Court strikes the attorney's brief does not immunize the attorney from being sanctioned for his dis-

respectful defiance expressed in the letter. *See e.g.*, Sup. Ct. R. 33.7.

In short this is not a case, as petitioner would have this Court believe, where the right to speak concerning public affairs, a right which is the essence of self-government, is at stake. Petitioner is not petitioning the government for a redress of grievances; he is not on the public stump criticizing the prudence of a piece of legislation; nor is he merely criticizing the judicial processing of attorney fees claims. What is at issue here is whether an attorney, after being twice requested by the Court to furnish information required by law—information which he had furnished the Court at least once before—can defiantly inform the Court that he will not obey or follow the law. This conduct should not and cannot be countenanced.

Petitioner contends that the clear-and-present-danger test formulated in *Bridges v. California*, 314 U.S. 252, 263, (1941) and in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-43 (1978) is the standard by which his comments should be measured. A more proper and complete analysis for examining the validity of petitioner's suspension, however, revolves around the two-part test articulated in *Procunier v. Martinez*, 416 U.S. 396 (1974). That test examines 1) whether the regulation or practice in question furthers an important or substantial governmental interest unrelated to the suppression of expression; and 2) whether the limitation of first amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved. *Id.* at 413.

There can be no doubt that judicial institutions have a substantial interest in ensuring the legitimacy and integrity of the judicial process and in maintaining public esteem and confidence for the legal profession and legal institutions. As stated by this Court in *Wood v. Georgia*, 370 U.S. 375 (1962) "We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government. . ." *Id.* at 383. Because lawyers are "officers of the court" with the special responsibility to protect the administration of justice, the courts have recognized the need for an imposition of some reasonable speech restrictions upon attorneys. *In re Hinds*, 90 N.J. 604, 449 A.2d 483, 489 (1982). "The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and are historically 'officers of the Court.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). There can be no doubt that the substantial governmental interest in ensuring the legitimacy, fairness, and integrity of the judicial process is unrelated to the suppression of expression.

The crucial issue in this matter is not whether the disciplinary sanction of petitioner furthered a justifiable and significant interest unrelated to the suppression of speech (this cannot be denied), but rather, whether the Eighth Circuit went further than was necessary and essential to protect the undisputed governmental interest. The record reveals that the Eighth Circuit did not go further than what was necessary and essential under the circumstances.

The clear-and-present-danger test is but one way in which a court examines whether a restriction on speech is no greater than is necessary or essential to protect the governmental interest involved. *Procunier v. Martinez*, 416 U.S. 396, 407 (1974). Another standard utilized by

some courts in determining the constitutionality of speech by attorneys is whether there is a "reasonable likelihood" that such speech will prejudice the administration of justice. *See Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969), *cert. denied*, 396 U.S. 990. Under either standard it is apparent petitioner was not denied his right of free speech.[4] The gravity and probability of the harm caused by plaintiff's disrespectful remarks is readily apparent. Courts need to exercise some control over attorneys and litigants in order to maintain judicial integrity and legitimacy. To hold otherwise would create judicial anarchy. In the instant matter, petitioner disrespectfully disobeyed what was tantamount to a court order and attempted to prevent the chief judge from carrying out his duties in administering the provisions of the Criminal Justice Act. This is precisely the type of conduct which this Court has intimated would justify a finding of criminal contempt. *Holt v. Virginia*, 381 U.S. 131, 136 (1965). *A fortiori*, this conduct is the proper subject of disciplinary sanctions. The request of the Court of Appeals that petitioner comply with the Criminal Justice Act guidelines is not a formal court order, but it deserves the same standing. This request was made as part of a judicial proceeding. The first amendment should not provide a cloak of protection for defiance and disrespect by a lawyer failing to comply with a court's request that he follow the law. What if attorneys defiantly refuse to follow the Federal Rules of Civil Pro-

4. There is no doubt that a lawyer cannot invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct. *See In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J., concurring). A majority of this Court in *Sawyer* also intimated that the clear-and-present-danger test is not applicable to a court's inherent power to discipline officers of the court for contumacious conduct. *See id.*

cedure, the Rules of the United States Supreme Court, or any other procedural rules that are necessary to help the Court function in a just and efficient manner? Petitioner would have this Court condone not only his conduct, but any conduct which would be disruptive of any court's procedures.

As an officer of the Court, an attorney is duty-bound to show respect for the law. How can the citizenry be expected to have public confidence in the legal system if one of the officers of the Court states in no uncertain terms that he will not follow or obey the law? This was not the first time that petitioner had represented indigent criminal defendants under the Criminal Justice Act. He had been appointed twelve previous times and had at least one previous case where he claimed fees in excess of $1,000. (*See* Supplement to Appendix.) In that prior case, petitioner had no trouble complying with the applicable rules. Presumably, petitioner was well aware of the requirements of the Criminal Justice Act and its guidelines when he sought payment for his representation of Dennis Warren. Instead of submitting the proper documentation pursuant to the Court's request, he disrespectfully questioned the Court's authority to administer the requirements of the Criminal Justice Act and defiantly informed the Court that he was not going to comply. His comments certainly were not designed to better the administration of justice. Indeed, one can reasonably draw the inference that petitioner's conduct in not supplying the Court with the required information, when he had done so in the past, was a willful and intentional act on his part designed to challenge and interfere with the system of processing fee and expense claims under the Criminal Justice Act. Petitioner's comments strike at the very heart of the viability of the law. By flaunting his disrespect for the law and refusing

to comply with the applicable guidelines, petitioner has impeded the administration of justice in the case that he was serving as counsel.[5] The Court of Appeals so found as a matter of fact. (J.A. 58.)

Finally, petitioner contends that his remarks in the October 6 letter further the important public interest of improving the judicial system and correcting its mistakes (J.A. 24), and that his letter is "the essence of self-government." (J.A. 36.) As stated above, petitioner was not suspended for his criticism of the judiciary. How can petitioner reasonably contend that his remarks to the Eighth Circuit that he is "extremely disgusted by the treatment of us by the Eighth Circuit" and that the Court "can take it or leave it" contribute to the marketplace of ideas on matters which concern the essence of self-government? He cannot. These remarks are not directed at the wisdom of a piece of legislation, nor do they pertain to the judicial system's capabilities to interpret and implement the rules and regulations promulgated under the Criminal Justice Act. Rather, the impact and effect of petitioner's remarks are clear: "I am not going to comply with the applicable legal guidelines, and your request that I do so is 'extremely disgusting.'"

Under these specific circumstances, the interests of judicial legitimacy and integrity as well as the public esteem for the legal system outweigh the extent to which

5. Congress has placed the responsibility on the chief judge of each circuit to approve claims for attorney compensation in excess of $1,000 in order to ensure that the provisions of the Criminal Justice Act are administered in an efficient and proper manner. It is noteworthy that in fiscal 1984 the total expenditures under the Criminal Justice Act were $40,665,000. (Summary Report of the Administrative Office relating to the Criminal Justice Act for fiscal year 1984). It is essential, therefore, that the chief judge of each circuit meticulously verify the hours and expenses on each claim.

free speech rights would be inhibited if petitioner's suspension were upheld. The free speech rights urged at some length by petitioner and the amici in their briefs would not be affected or deterred in the least.

B. Rule 46 of the Federal Rules of Appellate Procedure Is Constitutional.

The disciplinary procedures of all Circuit Courts of Appeal are embodied in Rule 46(c) of the Federal Rules of Appellate Procedure.[6] Petitioner asserts that Rule 46(c), as applied to the facts of this case, is unconstitutionally overbroad and vague. (Petitioner's Brief 37.) This issue, although contemplated by petitioner's first question for review, was not addressed or argued in Petitioner's Return to Order to Show Cause (J.A. 23-31), in the Petition for Rehearing En Banc (J.A. 70-87) or in the Petition for Writ of Certiorari. In any event, his argument is without merit.

Petitioner contends that his "alleged 'disrespectful' comments are protected by the First Amendment due to the lack of a substantial countervailing interest." (Petitioner's Brief 39.) As demonstrated in part I, A *supra*, petitioner's disrespectful refusal to comply with the guidelines promulgated under the Criminal Justice Act certainly interferes with substantial countervailing interests, namely, the legitimacy of the judicial process, the ability of a judicial officer to carry out his duties, and fostering public respect for the judiciary.

6. The Text of Rule 46(c) is as follows:

Disciplinary Power of the Court over Attorneys. A Court of Appeals may, after reasonable notice and an opportunity for hearing to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Petitioner's argument that Rule 46(c) is unconstitutionally vague is equally without merit. A statute is void for vagueness when it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Rule 46(c) has withstood similar challenges that its terms are so vague that men of common intelligence must necessarily guess at its meanings. *See In re Bithoney*, 486 F.2d 319, 323-25 (1st Cir. 1973).

Petitioner, as a member of the North Dakota bar and as a licensed practitioner in both the Federal District Court and the Court of Appeals, is bound by the ethical canons of the legal profession. (J.A. 58.) Petitioner is presumed to know and abide by the ethical canons of the legal profession. It defies belief that petitioner can maintain that his disrespectful refusal to obey a court's request that he comply with the law is conduct for which he had no idea he could be disciplined. To state petitioner's contention is to demonstrate its absurdity.

II. PETITIONER'S DUE PROCESS RIGHTS WERE FULLY COMPLIED WITH BY THE EIGHTH CIRCUIT COURT OF APPEALS.

Petitioner's due process claims are twofold: 1) that he was not apprised that his October 6 letter could be the basis of a disciplinary sanction and 2) that Chief Judge Lay erred in not recusing himself. Each argument is devoid of merit.

If, with due regard for the practicalities and peculiarities of the case, notice is given which serves to convey the required information, and affords a reasonable time for those interested to make their appearance, the constitutional requirements of due process are satisfied. *See Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 314-15

(1950). The process due under the circumstances attendant in this case was met as petitioner was afforded notice of the charges and a hearing appropriate to the nature of the case.

On November 3, 1983, Chief Judge Lay wrote Judge Van Sickle, with copy to the petitioner, concerning petitioner's letter of October 6 to the district court's secretary. (J.A. 15-18.) In that letter, Chief Judge Lay states in pertinent part:

> *I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. That demonstrates a total lack of respect for the legal process and the courts.*
>
> * * *
>
> Regardless of an attorney's view as to whether he feels obligated to provide pro bono work, *my concern now is related to the apparent refusal of the attorney involved in this case to comply with the Criminal Justice Act and the guidelines promulgated under it.*
>
> * * *

(Emphasis added.)

On December 22, 1983, the Court filed an Order to Show Cause. (J.A. 21-23.) The Order indicates that Mr. Snyder has refused to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorney fees. The Order further provides that in view of his refusal to *carry out his obligations as a practicing lawyer and as an officer of this court*, he is ordered to show cause as to why he should not be suspended from practicing in the federal district court, as well as in the United States Court of Appeals for the Eighth Circuit for such period of time as his refusal to serve continues. (Emphasis added.)

By virtue of the November 3, 1983, letter and the Order to Show Cause, petitioner clearly was put on notice that his letter of October 6 could form the basis for possible disciplinary action. How can petitioner, who expressed "extreme disgust" at his treatment by the Eighth Circuit and told the circuit to "take it or leave it," reasonably contend at this late date that he was surprised at the show cause hearing that the panel was concerned about his disrespectful comments in his October 6 letter? His "Return to Order to Show Cause" filed on January 16, 1984, confirms this beyond doubt. (J.A. 23-31.) Petitioner begins his "Argument" in that Return as follows: "The present proceeding was really initiated when the undersigned drafted and sent the letter of October 6, 1983. Had that letter not been sent, this proceeding would not be taking place." Petitioner's blatant and admittedly harsh remarks in that letter both questioned and criticized the Chief Judge's authority under the law to implement the provisions of the Criminal Justice Act. This was the very matter set forth in the Court's show cause order—a fact which petitioner concedes on page 40 of his brief.

Further, the record shows that on four occasions the Eighth Circuit gave Petitioner an opportunity to express his regret for his hasty conduct before acting to suspend him: 1) in Chief Judge Lay's letter of November 15, 1983 (J.A. 18-19); 2) during the course of the show cause hearing (J.A. 40, 45); 3) at the close of the show cause hearing (J.A. 50); and 4) in Chief Judge Lay's letter of February 24, 1984. (J.A. 53-54.) Petitioner elected not to do so. Petitioner was not disciplined because he failed to apologize; rather he was given the opportunity to apologize for his statements of disrespectful defiance in failing to comply with the Criminal Justice Act guidelines. At no time during this proceeding did petitioner raise a procedural due process issue; request a further hearing on his purported First Amendment rights; or request that he be given time to retain counsel. He was and remains steadfast in his position that he is going to do nothing about his disrespectful refusal to comply with the guidelines promulgated under the Criminal Justice Act. Petitioner writes in his February 27 letter: "I cannot and will *never,* in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms." (J.A. 54.) (Emphasis added.) In view of the petitioner's own position, his claims of procedural due process ring hollow. No material facts are at issue with respect to Mr. Snyder's conduct. In this particular setting, it would be an empty gesture to remand on due process grounds. *United States v. Lawson,* 600 F.2d 215, 218 (9th Cir. 1979).

Petitioner argues that Chief Judge Lay should have recused himself in consideration of this matter based upon the provisions of 28 U.S.C. §455.[7] He first alleges that Chief Judge Lay prejudged this matter by writing his November 3 letter. The November 3 letter merely anticipates the substance of the Order to Show Cause which was filed six weeks later. Surely, petitioner cannot contend that a judge who issues a show cause order is thereby prevented from presiding at a subsequent show cause hearing.

Petitioner also complains that the Chief Judge had personal knowledge of the facts concerning the proceedings

---

7. 28 U.S.C. §455 provides in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

from his initial involvement before the issuance of the Order to Show Cause. The mere fact that a judge gains prior knowledge of the facts concerning the matter before him is not, in and of itself, sufficient to require the judge to disqualify himself. *See United States v. Covern*, 662 F.2d 162, 168 (2nd Cir. 1981), *cert. denied*, 456 U.S. 916 (1982); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977). Furthermore, facts learned by a judge while acting in his judicial capacity can never be the basis for disqualification under 28 U.S.C. §455. *United States v. Patrick*, 542 F.2d at 390.

It is clear that the origin of the Chief Judge's personal knowledge of facts, as well as that of the other circuit judges, was gained solely as a judge in the matter before him. Because the alleged personal knowledge involved does not arise out of an extrajudicial source, the petitioner was not deprived of due process of law.

CONCLUSION

This is not a case of free speech involving criticism of a law or a court. This is a case where a lawyer was asked to comply with the law, but refused, stating that he was "extremely disgusted" that the Court would insist that he comply with the applicable legal guidelines. This is all this case is about. The Eighth Circuit has great difficulty with the proposition that any lawyer can assert that he is following his conscience which tells him to not only defy the Court's reasonable request that he comply with the law but to do so in a disrespectful manner. It seems incredulous that a lawyer can ask the highest court in the land to support his right to be disrespectful and to disobey the law.

The Eighth Circuit believes that this case does not present a substantial constitutional issue and respectfully requests that the writ of certiorari be dismissed as being improvidently granted. In the alternative, the Eighth Circuit respectfully submits that its judgment be affirmed.

Respectfully submitted,

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Attorneys for the United States Court of Appeals
For the Eighth Circuit

---

*Counsel of Record.

Dated this 29th day of March, 1985.

(10)

No. 84-310

In the Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:

Attorney Robert J. Snyder

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO SUPPLEMENT JOINT APPENDIX

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11 pp
folded

No. 84-310

In the Supreme Court of the United States

OCTOBER TERM, 1984

In the Matter of:

Attorney Robert J. Snyder

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT TO SUPPLEMENT JOINT APPENDIX

COMES NOW the United States Court of Appeals for the Eighth Circuit and, pursuant to Rule 42 of the Rules of the Supreme Court, moves that it be allowed to supplement the Joint Appendix, and in support thereof, states:

1. The United States Court of Appeals for the Eighth Circuit desires to make a part of the Joint Appendix in this matter what has been attached hereto as Exhibit A. Page 1 of Exhibit A is voucher form CJA 20 executed by petitioner seeking approval for attorney fees and reimbursement of expenses in excess of $1,000 for a case under the Criminal Justice Act in which he was appointed in 1980. Pages 2-4 of Exhibit A is petitioner's descriptive

memorandum detailing, by time, the nature of the legal services provided in that case. The Eighth Circuit believes Exhibit A is material and relevant to the issues involved in the case now pending before this Court.

2. The issue of petitioner's representation in cases under the Criminal Justice Act prior to the one now before this Court was raised by petitioner before the Eighth Circuit in the Petition for Rehearing En Banc (J.A. 84-87) and was addressed by the Eighth Circuit in its Order Denying the Petition for Rehearing En Banc. (J.A. 88-89.)

3. Through oversight and inadvertence, Exhibit A was not made a part of the Joint Appendix in this case. No prejudice would inure to the petitioner if this motion were granted and Exhibit A made a part of the Joint Appendix.

Respectfully submitted,

By .....

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Attorneys for the United States Court of Appeals For the Eighth Circuit

*Counsel of Record

Dated this 29th day of March, 1985.

CJA 20 Appointment & Voucher for Counseling Services

EXHIBIT A

APPOINTMENT

IN UNITED STATES ☐ MAGISTRATE ☒ DISTRICT ☐ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: U. S. A. vs SAMUEL LARGUS LESTER, a/k/a SAM STRETCHES

FOR: THE DISTRICT OF NORTH DAKOTA AT BISMARCK

LOCATION NUMBER: NDXBI 34101

PROCEEDING (describe briefly): Arraignment & Trial

CHARGE/OFFENSE (describe if applicable & check box *): Murder in the first degree

☒ Felony ☐ Misdemeanor

U.S. or other code citation: 18:1111 & 1153

PERSON REPRESENTED (Show full name & status, & check box *)

Name already appears as ☐ PR or as ☒ Of above

1 ☒ Defendant Adult
2 ☐ Defendant Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify Below)

DOCKET NUMBERS
Magistrate: MJ-80-21-02
District Court: CR 80-21
Court of Appeals:

VOUCHER NUMBER: 317316

COURT ORDER

☒ APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR: (name of prior counsel) (date appt'd.)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

Robert J. Snyder

Is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or magistrate: [signature] Date: 7-8-80

OR BY ORDER OF THE COURT

(Clerk or Deputy)

CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received: ☐ Yes ☒ No

If "Yes", how much were you paid? $

By whom were you paid?

If this is an appeal did you represent person in lower court: ☐ Yes ☐ No

SIGNATURE OF ATTORNEY/PAYEE: I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS — DATE

APPROVED FOR PAYMENT — SIGNATURE OF JUDGE/MAGISTRATE — DATE — AMOUNT

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS — DATE

* TIME SPENT	DATES	HOURS	AMOUNT
I IN OPEN COURT	See Attached Sheets		
A. ARRAIGNMENT & OR PLEA		4.50	RATE PER HR.
B. MOTIONS & REQUESTS			
C. BAIL HEARINGS			
D. SENTENCE HEARINGS		.75	$
E. TRIAL		32.50	30
F. REVOCATION			
TOTAL "IN COURT" HOURS		37.75	
II OUT OF COURT	See Attached Sheets		
A. INTERVIEWS & CONFERENCES		18.00	
B. OBTAINING & REVIEWING RECORDS		20.50	
C. LEGAL RESEARCH & BRIEF WRITING		4.90	$
D. INVESTIGATIVE & OTHER WORK (Specify)		1.00	20
(2) TRAVEL TIME (office hours only)			
(3) MILEAGE (and trips under 1 hr not allowed)			
(4) OTHER (Specify)			
TOTAL "OUT OF COURT" HOURS		44.40	$
TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME			$

1000923

CERTIFIED CORRECT FOR PAYMENT — JAN 22 1981 — AUDIT SECTION ADMIN. OFF. U.S. COURTS

III ITEMIZED EXPENSES (Specify, per instruction sheet)

	AMT. PER ITEM
Investigation expense	$ 1,435.70
12 trips to Mandan, 12 miles at $.17	28.48
Long distrance phone call to Cannon Ball	1.46
143 photocopies at $.25 each.	35.75
TOTAL ITEMIZED EXPENSES	
TOTAL COMPENSATION & EXPENSES	$
DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE	
NET AMOUNT CLAIMED	$ 3,562.84

* If more space is needed use additional blank sheets

Robert J. Snyder — 1/6/81 — $ 3,562.84

Donnell D. Foley — DATE 1/8/81 — 2082.19

COUNSEL: [X] IS A PRIVATE ATTORNEY; IS FURNISHED BY: ☐ COMMUNITY DEFENDER ORGANIZATION ☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. (701) 258-1611

SOCIAL SECURITY NO. 475-52-1817

VOUCHER NUMBER 317316

PAID

ATTORNEY / ORGANIZATION / ADDRESS

Robert J. Snyder
219-1/2 E. Broadway
P. O. Box 2071
Bismarck, ND
ZIP CODE 58501

RECEIVED

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

COPY 1 - MAIL TO ADMINISTRATIVE OFFICE AFTER PERSON REPRESENTED

BICKLE, COLES AND SNYDER
Attorneys at Law
P.O. Box 2071
219½ East Broadway
The Little Building
Bismarck, North Dakota 58501

Telephone
(701) 258-1611

TO: U.S. District Court
Federal Building
Bismarck, ND 58502

ATTORNEY: Snyder
MATTER: Lester/Murder
FILE: 80-223

November 26, 1980

Statement of Legal Services and Expenses

DATE	DESCRIPTION	
	LEGAL SERVICES OUT OF COURT HOURS	
7–9–80	Travel to and from Mandan; conference with client;	.75 hrs.
7–10–80	telephone conversation with Jim Hill, United States attorney;	.10 hrs.
7–14–80	travel to and from Mandan; conference with client;	.75 hrs.
7–15–80	preparation of Motion for Bond Reduction; preparation of Affidavit of Service by Mail; preparation of letter to Clerk of District Court with enclosures;	.66 hrs.
7–17–80	review of initial reports in United States Attorney's file;	1.00 hrs.

DATE	DESCRIPTION	
7–22–80	preparation of Motion for Appointment of Investigator; preparation of Affidavit of Service by Mail; preparation of letter to Magistrate Kautzmann with enclosures;	.80 hrs.
7–22–80	conference with Jim Hill;	.25 hrs.
7–23–80	travel to and from Mandan; conference with client;	.75 hrs.
8–8–80	conference with investigators of Capitol City Security Consultants;	.5 hrs.
8–11–80	telephone conversation with Cannon Ball Security office;	.10 hrs.
8–15–80	preparation of Authorization of Transcript; preparation of letter to Magistrate Kautzmann with enclosures;	.53 hrs.
8–15–80	telephone conversation with client;	.10 hrs.
8–19–80	travel to and from Mandan, conference with client.	.75 hrs.
8–21–80	telephone conversation with client;	.15 hrs.
8–27–80	travel to and from Mandan; conference with client;	1.00 hrs.
9–5–80	telephone conversation with U.S. Marshall's office;	.10 hrs.
9–5–80	telephone conversation with client;	.15 hrs.
9–8–80	telephone conversation with Jim Hill;	.15 hrs.
9–8–80	travel to and from Mandan; conference with Magistrate Kautzmann; conference with client;	1.25 hrs.

DATE	DESCRIPTION	
9–9–80	telephone conversation with Chuck Feland of Capitol City Security Consultants;	.20 hrs.
9–17–80	Conference with Bella Feather;	.50 hrs.
9–18–80	travel to and from Mandan; conference with client;	.75 hrs.
9–24–80	telephone conversation with client; telephone conversation with Ralph Vinje; telephone conversation with Special Agent Willis of the FBI;	.30 hrs.
9–24–80	telephone conversation with Chuck Feland of Capitol City Security Consultants;	.15 hrs.
9–25–80	review of investigative reports;	.50 hrs.
9–26–80	conference with Ralph Vinje;	1.00 hrs.
10–2–80	travel to and from Mandan; conference with client;	1.00 hrs.
10–7–80	conference with investigators; legal research; review of investigative reports; conference with Ralph Vinje;	4.50 hrs.
10–8–80	telephone conversation with client;	.15 hrs.
10–13–80	travel to and from Mandan; conference with client; conference with Floyd Stretches; conference with Mary Stretches; conference with Asa Lester;	2.50 hrs.
	trial preparation;	3.00 hrs.
10–13–80	telephone conversation with Jim Hill.	.15 hrs.
10–12–80	trial preparation;	3.00 hrs.

DATE	DESCRIPTION	
10–10–80	conference with Jim Hill;	.75 hrs.
10–9–80	conference with Jim Hill; telephone conversation with Ralph Vinje;	.85 hrs.
10–9–80	travel to and from Mandan; conference with client;	.75 hrs.
10–8–80	preparation of Request for Voir Dire Examination one through four; preparation of letter to Clerk of Court; preparation of letter to Jim Hill; preparation of letter to Judge Davies with enclosures; preparation of Affidavit of Service by Mail;	1.25 hrs.
10–8–80	preparation of Motion in Limine and Affidavit of Service by Mail; preparation of letter to Clerk of Court with Enclosures;	.66 hrs.
10–8–80	preparation of Defendant's Request for Jury Instructions one through eight;	1.00 hrs.
10–14–80	trial preparation;	1.50 hrs.
10–15–80	trial preparation;	1.50 hrs.
10–16–80	trial preparation;	1.50 hrs.
10–17–80	trial preparation;	.50 hrs.
10–20–80	trial preparation;	1.50 hrs.
10–21–80	trial preparation;	2.00 hrs.
10–27–80	telephone conversation with client;	.10 hrs.
11–10–80	telephone conversation with client; telephone conference with Bob Pfenning;	.20 hrs.

DATE	DESCRIPTION	
11–18–80	review of presentence investigation report;	.50 hrs.
11–19–80	travel to and from Mandan, conference with client; legal research regarding Federal Youth Corrections Act;	1.75 hrs.
	Total Out of Court Hours:	
	42.60 hrs. at $20.00 per hour = $852.00	
	IN COURT HOURS	
7–8–80	Initial appearance;	.50 hrs.
7–18–80	appearance at preliminary hearing;	2.00 hrs.
8–6–80	appearance at arraignment and omnnibus hearing;	2.00 hrs.
10–14–80	attendance at first day of trial.	5.00 hrs.
10–15–80	attendance at second day of trial.	5.00 hrs.
10–16–80	attendance at third day of trial.	5.00 hrs.
10–17–80	attendance at fourth day of trial.	2.50 hrs.
10–20–80	attendance at fifth day of trial.	5.00 hrs.
10–21–80	attendance at sixth day of trial.	4.00 hrs.
10–22–80	attendance at seventh day of trial.	5.00 hrs.
10–23–80	attendance at eighth day of trial.	1.00 hrs.
11–20–80	appearance at sentencing.	.75 hrs.
	TOTAL IN COURT HOURS	
	37.75 hours at $30.00 per hour = $1,132.50	
	Total Legal Services $1,984.50	

NOTE: At our regular billing rate of $50.00 per hour the above figure would be $4,0177.50.

EXPENSES:

Investigation expense (see attached sheet)	1,485.70
12 trips to Mandan, each 12 miles at $.17 per mile.	28.48
Long distance phone call to Cannon Ball, North Dakota.	1.46
143 photocopies at $.25.	35.75
Total Expenses	$1,547.39
TOTAL BALANCE DUE	$3,531.89

No. 84-310

In The

Supreme Court of the United States

October Term, 1984

IN THE MATTER OF ATTORNEY
ROBERT J. SNYDER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The responsive brief submitted by the Eighth Circuit raises an additional issue which petitioner believes demands a response. Accordng to the Eighth Circuit, petitioner's failure to submit sufficient documentation of the services rendered in *United States v. Warren* constituted refusal "to comply with regulations concerning the payment of attorney fees and reimbursement of expenses under the Criminal Justice Act." Appellee's Brief at 6. Throughout appellee's brief, the Eighth Circuit insists that petitioner refused "to comply with the law." *Id.* at 7, 10, 12, 13, 14. The Eighth Circuit fails, however, to quote the provisions of the Criminal Justice Act, or the guidelines used to administer it, that Snyder allegedly refused to obey. There is a simple reason for this failure: Except for one minor matter not at issue,[1] Snyder complied with the Criminal Justice Act and its guidelines. Indeed, in the final request for documentation sent to Snyder, the Eighth Circuit administrative secretary admitted that the

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1. Where a request is above the maximum dollar amount, counsel is required by the guidelines to submit with the voucher "a memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation." Guidelines for the Administration of the Criminal Justice Act § 2.22(B) (1). (J.A. 100-02). This memorandum is not required when counsel does not request excess fees. *Id.* at § 2.22(A). (J.A. 99-100).

The administrative secretary initially requested the excess fee memorandum. Later, however, she dropped this request, apparently because Judge Van Sickle's letter was considered sufficient support for the excess payment. In any event, Snyder was not suspended for failing to submit this memorandum; nor was it ever an issue after the administrative secretary received Snyder's computer records. Moreover, Snyder was later refused the excess fees.

documentation was sufficient; it merely was not in the form that she desired. (J.A. 13).

At the time in question, 18 U.S.C. § 3006A (J.A. 97-99) provided that attorneys appointed pursuant to the Criminal Justice Act were to be compensated at a rate not exceeding $30 per hour for in-court time and $20 per hour for out-of-court time. *Id.* at subd. (d) (1). The provision that describes the materials to be submitted by counsel reads as follows:

> Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred . . . .

Id. at subd. (d) (4). (J.A. 99). Snyder complied with this requirement through the CJA Form 20 (J.A. 1).[2] A question arose, however, as to the exact form of the supporting documentation.

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2. In situations where counsel has not provided a breakdown of the in-court/out-of-court hours, the court has the option of refusing to apply the higher rate. Should an attorney decide submission of a breakdown is not worth the trouble, that is his or her perogative. Section 3006A(d) (4) (J.A. 99) does not *require* a breakdown of the in-court/out-of-court hours. All that is required is a specification of "the time expended, services rendered, and expenses incurred. . . ." While it is true that the attorney has the burden of demonstrating which portions of his bill deserve reimbursement at the higher in-court rate, it is also true that should counsel fail to carry that burden, the court need only apply the lower rate.

Nor do the guidelines for implementation of the Criminal Justice Act require a breakdown of in-court/out-of-court hours. A review of the guidelines, including the portions cited by appellees (see Appellee's Brief at 1), demonstrates that there is no *requirement* placed upon attorneys to submit an in-court/out-of-court breakdown. Nonetheless, attorneys submit this breakdown as part of the CJA Form 20.

Snyder's computer system, which has since been replaced, included various billing codes. The billing codes included a $20 per hour rate, but not a $30 per hour rate. Snyder therefore listed all CJA work on his computer at the $20 rate, and noted on the computer readout whether the work entailed in-court or out-of-court time. Upon completion of his work for his client, Snyder went through his computer sheets (J.A. 4-12), totaled the time expended for in-court time, and increased the total bill to reflect these hours. Snyder reflected this increase on the CJA Form 20 he submitted to the Eighth Circuit. (J.A. 1). Thus, the CJA Form 20 included a breakdown of in-court/out-of-court hours.

The Eighth Circuit administrative secretary returned the form, requesting documentation supporting the request and a memorandum supporting the claim. Snyder responded by submitting his computer sheets, which necessarily reflected billing at the out-of-court rate. The administrative secretary may have been confused by the difference between the computer sheets and the CJA voucher. She returned Snyder's documentation, requesting that he modify the computer sheets to reflect the hours expended, stating that "I suppose we could figure it out by doing the division, but we don't have that kind of time . . . ." (J.A. 13). She apparently did not wish to take the time to make the computations. Thus, the necessary documentation was submitted; it just was not in the exact form that the Eighth Circuit administrative secretary preferred. In response, Snyder wrote the letter which is at issue in this case.

Snyder did not violate any law or guideline by failing to submit further documentation of the in-court/out-

of-court time expended. Except for one minor matter not at issue (*see supra* note 1), Snyder complied fully with the Criminal Justice Act and the guidelines used to administer it. The request by the administrative sectary dated September 26, 1983 (J.A. 13) was merely a matter of administrative convenience, and not a matter of compliance with the Criminal Justice Act or its guidelines.

Nor is it appropriate to construe a request from an administrative secretary for further documentation as an order from the Eighth Circuit. Appellee provides no authority for this proposition, and petitioner is aware of none.

Lastly, Snyder objects to the Eighth Circuit's attempt to circumvent the real reason for Snyder's suspension: the content of his letter and his refusal to apologize for it.[3] As is demonstrated by the above discussion, Snyder

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3. It is interesting to note how the Eighth Circuit has repeatedly changed the reason for Snyder's suspension. According to the show cause order, Snyder was subject to suspension for refusing to serve on the CJA panel. (J.A. 22). Once the court realized during the show cause hearing that the North Dakota plan was based on voluntary service, the court focused on Snyder's compliance with the CJA guidelines (and asserted that Snyder nonetheless had an obligation to provide *pro bono* services). (J.A. 32). The court also requested an apology from Snyder. See J.A. 40, 41, 43, 45, 50 (hearing). Once Snyder complied with the first two requirements, the court focused on the request for an apology. J.A. 52-53 (letter from Judge Lay to Snyder). When Snyder refused to apologize, the Eighth Circuit panel suspended him explicitly for that refusal, 734 F.2d at 337 (J.A. 59-60), and the court en banc conditionally vacated the panel's order of suspension and provided Snyder an additional ten days "to provide a sincere letter of apology to this Court for the disrespectful comments directed to the Court in his letter of October 6, 1983, sent to Judge Van Sickle's secretary." 734 F.2d at 344 (J.A. 95). In its brief, the court now "champions" Snyder's First Amendment rights (Appellee's

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did not violate the law. But even if he had refused "to comply with the law" or the "regulations concerning the payment of attorney fees and reimbursement of expenses under the Criminal Justice Act," his suspension was not based on that issue. At stated in Snyder's initial brief to this Court, "Snyder was suspended because of the 'disrespectful' nature of his remarks and because of his refusal to apologize for them." Petitioner's Brief at 19-20 (footnote deleted). This fact is made absolutely clear not only by the first opinion issued by the Eighth Circuit,[4] but also through the letters sent by Judge Lay prior to the issuance of the panel opinion[5] and the statements of the panel at

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Brief at 6) and argues that Snyder was not suspended for his refusal to apologize, but for his failure to "comply with the law." Once again, the Eighth Circuit has changed its reasoning.

4. *See* 734 F.2d at 337 (J.A. 59-60):

> As we will discuss, Snyder now conditionally has offered to serve in indigent cases and to comply with the CJA guidelines. However, in a letter to the court he has otherwise refused to retract or apologize for his disrespectful remarks to the court. . . .
>
> We find Snyder's present statement that he will conditionally comply with the guidelines not enough. His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate to the court that he is not presently fit to practice law in the federal courts. . . .

5. *See* J.A. 18-19 and J.A. 52-53. In his November 15, 1983, letter to Judge Van Sickle, Judge Lay stated as follows:

> At this point, I feel that if Mr. Snyder wishes to write the court offering his apology to the court for his disrespectful comments, and assuring the court that he will in the future be willing to comply with the requirements of the CJA guidelines, I will then be willing to recommend to the

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the hearing on April 16, 1984.[6] The letters and the statements make it obvious that all the Eighth Circuit desired was an apology, and that if Snyder had apologized he would not have been suspended. This fact is confirmed by the *en banc* decision, where the full Court conditionally vacated the panel's order of suspension and provided Snyder an additional ten days "to provide a sincere letter of apology to this Court for the disrespectful comments directed to the Court in his letter of Oct. 6, 1983, sent to Judge Van Sickle's secretary" 734 F.2d at 344 (J.A. 95).

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court that the order to show cause not be filed and, as a result, become public record.

J.A. 19. Following the show cause hearing and receipt of Snyder's letter agreeing to the other two items, Judge Lay wrote directly to Snyder, stating that

> [t]he court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. . . . Before circulating your letter of February 23, I would appreciate your response to Judge Arnold's specific request, and the court's request for you to apologize for the letter that you wrote. . . . I am confident that if such a letter is forthcoming that the court will dissolve the order.

J.A. 53.

6. *See, e.g.*, J.A. 40, 41, 43, 45, 50. This point is best shown at J.A. 43:

> I've given you every opportunity to simply apologize to the court and to indicate that you will continue with your criminal law obligations. That's all I asked Judge Van Sickle to ask you. You refuse to do that. In the order to show cause, which is very simply and succinctly stated, I gave you every opportunity to purge—you wouldn't even have had to bother to the extents of coming down here—by simply writing to the court and saying "yes, you would continue to serve in pro bono obligations when asked and that you will continue to comply with the guidelines." That's all you have to do.

Snyder's letter of February 22, 1984, takes care of the court's concerns, except for the apology. (J.A. 51-52).

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